

***United States Court of Appeals  
for the  
District of Columbia Circuit***



**TRANSCRIPT OF  
RECORD**



# TRANSCRIPT OF RECORD.

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## Court of Appeals, District of Columbia

OCTOBER TERM, 1910.

No. 2210.

769

No. 11, SPECIAL CALENDAR.

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CORNELIUS C. BILLINGS, ACTING COMMISSIONER OF  
PATENTS, APPELLANT,

*v.*

MILLARD F. FIELD.

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APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

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FILED AUGUST 23, 1910.

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# In the Court of Appeals of the District of Columbia.

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No. 2210.

CORNELIUS C. BILLINGS, &c., Appellant,

vs.

MILLARD F. FIELD.

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*a* Supreme Court of the District of Columbia.

At Law. No. 52700.

MILLARD F. FIELD, Petitioner,

versus

CORNELIUS C. BILLINGS, Acting Commissioner of Patents,  
Respondent.

UNITED STATES OF AMERICA,  
*District of Columbia, ss:*

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

*1* *Petition for Writ of Certiorari.*

Filed June 15, 1910.

In the Supreme Court of the District of Columbia.

At Law. No. 52700.

MILLARD F. FIELD, Petitioner,

versus

CORNELIUS C. BILLINGS, Acting Commissioner of Patents,  
Respondent.

To the Honorable Justices of the Supreme Court of the District of Columbia:

Your Petitioner, Millard F. Field, respectfully represents—

1. That he is a citizen of the United States and resides in the

1—2210A

Town of Winthrop in the County of Suffolk and Commonwealth of Massachusetts, and files this petition in his own right.

2. That the respondent, Cornelius C. Billings, is a citizen of the United States, a resident of the District of Columbia, is duly commissioned First Assistant Commissioner of Patents, is and has been acting under the law by designation as Commissioner of Patents, and, as such, is the custodian of the records of the United States Patent Office hereinafter mentioned.

3. That prior to the 23rd day of June, 1898, your Petitioner believed and still believes he was the true, original and first inventor and discoverer of certain new and useful improvements in  
2 Warp-Drawing machines, not known or used by others in this country before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country before his invention or discovery thereof, or more than two years prior to his application, and not in public use or on sale in this country for more than two years prior to his hereinafter-mentioned application for Letters Patent therefor, and not patented or caused to be patented in any foreign country on an application filed by him or his legal representatives or assigns more than seven months prior to his application for patent in this country, and which had not been abandoned; and so believing that he was the true, original and first inventor thereof, he, on the said 23rd day of June, 1898, filed in the United States Patent Office an application for Letters Patent of the United States for said invention.

4. That said application was made, by your Petitioner, in writing, and addressed to the Commissioner of Patents, in due form, as required by the Statutes of the United States, and by the rules of practice in the United States Patent Office in such cases made and provided and with said application was filed by your Petitioner a written description of his said invention, and of the manner and process of making, constructing, practicing and using the same, in such full, clear, concise and exact terms as to enable any person skilled in the art or science to which said invention appertains or with which it is most closely connected, to make, construct, practice and use the same and in such written description the principle of your Petitioner's said invention and the best mode in which your  
Petitioner contemplated applying the same were explained;  
3 and your petitioner, particularly pointed out — distinctly claimed in his said application the parts, improvements, and combinations which he claimed as his invention; and the specification and claims of said application were signed by your Petitioner and attested by two witnesses;

5. That your Petitioner did further furnish with said application drawings of his said invention, signed by his attorney and attested by two witnesses;

6. That your Petitioner did further make oath before a proper officer, according to law, that he verily believed himself to be the original and first and sole inventor and discoverer of the said invention for which he solicited a patent, that he did not know and did

not believe that the same was ever before known or used, and did state of what country he was a citizen;

7. That your Petitioner at the time of the filing of his said application did pay to the said Commissioner of Patents \$15. the fee required by law and did in all respects fully comply with the statutes of the United States and with the rules of practice in the United States Patent Office in such cases made and provided and that the said application became known and designated as application Serial No. 684,201;

8. That on October 9, 1906, said application was by the Commissioner of Patents placed in interference by interference proceedings numbered in the Patent Office 26,590 with an application filed by one Howard D. Colman May 18, 1906, Serial No. 317,547, entitled "Improvements in Machines for Drawing-in Warp Threads;" that

4       the said application of Colman is alleged to be a continuation of a second and earlier application by said Colman filed September 6, 1902 (abandoned May 28, 1906) Serial No. 122,361; and that furthermore said last mentioned application is alleged to be a continuation of a still earlier first application filed by the said Colman October 24, 1894, (abandoned October 6, 1902) Serial No. 526,856; and that, in virtue of the alleged connection between the said three several applications of said Colman, said Colman was made the senior party to the said interference and your petitioner was notified that judgment of priority of invention would be rendered on the record against your Petitioner and in favor of said Colman because the date of conception alleged by your Petitioner in his preliminary statement filed in said interference was subsequent to the filing date of the earliest of the said alleged continuing applications of said Colman;

9. That the basis for such threatened judgment of priority on the record as the aforesaid by the Commissioner of Patents was the assumption by the said Commissioner under the settled rules of decision adopted by him that the three applications of said Colman as aforesaid were and are continuous and constitute one application whereby said third Colman application, No. 317,547, filed May 18, 1906, is the same in legal effect for the purpose of adjudicating said interference as if it had been filed October 24, 1894, in the place and instead of the said first Colman application, Serial No. 526,856;

10. That after the filing of the said second Colman application, Serial No. 122,381, on September 6, 1902, of which the third or last said Colman application, Serial No. 317,547, filed May 18, 1906, in  
5       interference, is alleged to be a continuation, action was taken by the Patent Office upon said second application, amounting to a rejection thereof, under date of December 6, 1902, of which action notice was duly given by the Commissioner of Patents to said Colman, a copy of the said action so taken by the Patent Office being hereto annexed as Exhibit "A" and made a part hereof.

11. That following such action of rejection by the Patent Office said Colman failed to prosecute the said second application within one year from the date of said action, December 6, 1902; and that under the provisions of Sec. 4894 of the Revised Statutes as amended,

the said application thereby became abandoned on December 6, 1903;—the said statute as then amended being as follows:;

“SEC. 4894. All applications for patents shall be completed and prepared for examination within one year after the filing of the application and in default thereof, or upon failure of the applicant to prosecute the same within one year after any action therein, of which notice shall have been given to the applicant, they shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Commissioner of Patents that such delay was unavoidable.”

12. That thereafter, on January 11, 1904, the said Colman, seeking to revive or reinstate the said second application, filed a petition therefor addressed to the Commissioner of Patents; that certain proceedings were had on said last mentioned petition, which proceedings together with the said petition are fully set forth in Exhibit “B” hereto annexed and made a part hereof; and that as a result of said proceedings an order was entered by the Commissioner of Patents granting said petition of said Colman for the revival or reinstatement of said application with the intent and object of relieving the same from the presumption of abandonment and forfeiture arising under said Section 4894 of the Revised Statutes;

6 13. That the alleged continuity of said Colman applications whereby the said third application is held to be directly a continuation of said second application and thereby indirectly a continuation of the said first application is absolutely dependent upon the validity of said order of revival of said second application; and the final judgment of priority on the record with which your petitioner is threatened in said interference proceedings is likewise based upon said alleged continuity of said Colman applications and upon the validity of said order of revival of said second application;

14. That the jurisdiction to revive or reinstate applications after abandonment has arisen under said Sec. 4894 of the Revised Statutes has been held by the Commissioner of Patents to be vested in said Commissioner and in no other officer or tribunal; that all proceedings in relation to such matters of revival or reinstatement are had before and by the Commissioner; and that the subordinate tribunals in the Patent Office decline to reconsider the status or validity in matter of law or any order or decision made by the Commissioner relating to such matters of reinstatement or revival regarding the decision of the Commissioner as final and conclusive of such matters.

15. That being threatened with judgment of priority of invention on the record as aforesaid your Petitioner on February 18, 1910 laid before the Commissioner of Patents a petition alleging that said order of revival of said Colman second application has been made without lawful authority and was without warrant in law, and that

7 this was apparent on the face of the record; and in said last mentioned petition your Petitioner prayed that the Commissioner would re-examine and re-consider the matter of the validity of said revival order and that on such reconsideration the Commissioner would vacate the said order of revival as having been made without warrant under the law;

16. That there is hereto attached as Exhibit "B" a full copy of all the parts of said last mentioned petition that are material and pertinent to the matter of said revival order, said exhibit setting out in full the papers in the Patent Office record before the Commissioner of Patents relating to the said petition for the revival of said Colman second application, the showing made in support of said last mentioned petition on behalf of the Petitioner therein, the reference thereof by the Commissioner of Patents to the Primary Examiner, the report of the Primary Examiner on such reference, and the final order of the Commissioner granting said petition for revival; and that there is also attached hereto as Exhibit "C" and made a part hereof a copy of the amendment filed by Colman with the said petition to revive and referred to therein;

17. That on May 31st, 1910, the said Cornelius C. Billings, acting as, and for the time being, Commissioner of Patents, rendered judgment on said petition so laid before said Commissioner by your Petitioner on February 18, 1910, said judgment affirming the validity of said revival order and refusing to vacate the same, a copy of said judgment being hereto annexed and marked Exhibit "D";

8 18. All of which will more fully and at length appear and be shown in the record exhibits which accompany this petition and have been hereinbefore mentioned, to wit:

*Exhibit A.*—Copy of the Patent Office action of December 6, 1902 in the second Colman application Serial No. 122,381.

*Exhibit B.*—Copy of those portions of Field's petition to the Commissioner of Patents dated February 18, 1910, which relate to the revival of the second Colman application.

*Exhibit "C."*—Copy of the amendment to the second Colman application Serial No. 122,381 filed January 11, 1904, and accompanying the petition to revive.

*Exhibit D.*—Copy of the decision of May 31, 1910 by the Commissioner of Patents on Field's petition of February 18, 1910.

19. That said order of revival and said judgment of said Commissioner affirming the same and refusing to vacate the said order constitute under the rules of procedure in the Patent Office duly established by the Commisisoner a final decision by the Commissioner of Patents binding upon all the tribunals of the Patent Office that said order of revival was lawfully made upon the record then and now before the said Commissioner.

9 20. That it clearly appears on the face of the record in the Patent Office as set out in said Exhibits hereto attached that the order of the Commissioner of Patents reviving said application and the judgment of said Commissioner refusing to vacate said order of revival are erroneous in law and that said revival was made on a verified showing on the part of said Colman of wilful and intentional delay and of gross negligence and without any showing whatever of the existence of "unavoidable delay," which latter is required by law as a condition precedent to the revival of an application abandoned under R. S. Sec. 4894; and that it further clearly appears on the face of said record that said order of revival was made, so far as a consideration of grounds therefor by the Commis-

sioner of Patents was concerned, as a matter of convenience to the Patent Office and without regard to the limitations of law imposed by the statutes in that case made and provided; and without regard to the rights of third parties and particularly without regard to the rights of your Petitioner growing out of his said application for patent of June 23, 1898;

21. That it therefore appears on the face of the record in said interference proceedings as set out in said Exhibits that the said Commissioner of Patents, on the verified showing required by the rule established by said Commissioner of Patents reading as follows:

*Revival of Abandoned Applications.*

DEPARTMENT OF THE INTERIOR,  
UNITED STATES PATENT OFFICE,  
WASHINGTON, D. C., July 13, 1900.

Notice is hereby given that petitions for the revival of abandoned applications will not be docketed for hearing. A full showing of the reasons for reviving an application must be filed with the petition for revival, and the case will be disposed of on such showing without oral argument.

C. H. DUELL,  
*Commissioner.*

10 and in support of said Colman's petition for the revival of said Colman's second application, and on the whole record relating to said last mentioned petition, had no statutory power or jurisdiction to enter an order reviving said second Colman application; and that the act of the said Commissioner in granting said petition for the revival of said second application and in entering an order to that effect was an arbitrary act unwarranted by law and the Patent Office rules, in excess of the jurisdictional power of said Commissioner, and prejudicial to the rights of your Petitioner.

22. That it therefore further appears on the face of said record that the act of the said Commissioner of Patents, the respondent, in denying by his said order and judgment, dated May 31st, 1910, the relief prayed for in the petition of your Petitioner filed before said Commissioner of Patents on February 18, 1910, and in affirming the validity of the said order of revival of said Colman's second application theretofore entered by said Commissioner as aforesaid, was a denial of your Petitioner's legal rights and was a final affirmation by the said Commissioner of the validity of a judicial act performed by him plainly beyond the jurisdictional power conferred upon him by law;

23. That said Commissioner's order of revival and said respondent's judgment refusing to vacate said order greatly embarrass and prejudice the rights of your Petitioner; that, if said order and said judgment stand unreversed, they fix the date of Colman's invention, for purposes of judgment of priority over your Petitioner, as of the date of the first Colman application

of October 24, 1894 instead of as of the date of his said third application of May 18, 1906, and, as claimed by the Commissioner of Patents and by Colman, will justify and require all the tribunals of the Patent Office having power to pass upon the question of priority of invention in interference cases, to wit, the Examiner of Interferences, the Board of Examiners in Chief and the Commissioner of Patents, and as claimed by Colman, will also justify and require the Court of Appeals of the District of Columbia upon appeal from the final judgment of the Commissioner to render judgment of priority of invention in respect to the issues in said interference against your Petitioner and in favor of said Colman; that the said order of revival and said judgment refusing to vacate the same are not now, at the present stage of the proceedings of said interference, reviewable by direct appeal to the Court of Appeals of the District of Columbia since under the statute authorizing appeals to said Court as uniformly interpreted by said Court of Appeals that Court has no jurisdiction to entertain any appeal save an appeal from the final judgment of the Commissioner on the question of priority of invention, which kind of judgment the Commissioner has not yet rendered, and that said order of revival and said judgment are not, according to the contention of said Colman, reviewable hereafter as ancillary of the question or priority of invention should an appeal be taken from an appealable judgment of the Commissioner on said question of priority of invention, it being the contention of said

12 Colman that the judgment of the Commissioner in the matter of the revival of said abandoned application of Colman is final and conclusive and unappealable and unreviewable in any way; that unless your petitioner can have the action of the Commissioner aforesaid reviewed by this Honorable Court by its writ of Certiorari, your petitioner will be forced to go through a long protracted and inconclusive course of proceedings upon the question of priority of invention upon the present record before the Examiner of Interferences, the Board of Examiners in Chief, the Commissioner of Patents, and possibly before the Court of Appeals of the District of Columbia, before he can review the action of the Commissioner on the question of the revival of said Colman application by a bill in equity filed and prosecuted under the provisions of Section 4915 of the Revised Statutes of the United States; that this Court, by the granting of its writ of certiorari, may speedily, and without delay and without circumlocution, review the validity of the action of the Commissioner in the premises on said question of revival of the said Colman application; that your Petitioner's right to a review of the Commissioner's said order and judgment reviving, and holding as properly revived, the said Colman second application is clear and that no other prompt and adequate remedy, by appeal or otherwise, is open to your Petitioner in that behalf; and that this petition is presented in good faith and not for the purpose of delay.

13 Wherefore your Petitioner prays that this court will issue its Writ of Certiorari to Cornelius C. Billings, acting as Commissioner of Patents, as aforesaid, commanding him to certify to

this court the record of the proceedings before the Commissioner of Patents in said interference consisting of said Petition filed before said Commissioner by your petitioner on February 18th, 1910 and consisting further of the judgment rendered by said respondent, acting as Commissioner, on said last mentioned petition on May 31st, 1910;—and consisting further of the Patent Office Action of December 6th, 1902, in the Second Colman application Serial No. 122,381, the petition for revival of said second Colman application, the amendment to the said Colman application filed with said petition, the affidavits and letters submitted to said Commissioner in support thereof, the reference thereof to the Primary Examiner, the report of the Primary Examiner thereon, and the entry of judgment by the said Commissioner on said last mentioned petition.

And your Petitioner further prays that upon a return of said record into this Court and upon the truth of the foregoing allegations being made to appear through due proceedings had this Honorable Court will enter an order quashing said order of revival and quashing the said judgment of said respondent acting as Commissioner, refusing as aforesaid to vacate the said order of revival.

And your Petitioner further prays that this Honorable Court direct said Cornelius C. Billings, acting as Commissioner of Patents to stay all proceedings in said interference in the Patent  
14 Office until the final determination of this petition.

And as in duty bound your Petitioner will ever humbly pray, etc.

MILLARD F. FIELD.

FREDERICK L. EMERY,  
THOMAS B. BOOTH,  
MELVILLE CHURCH,  
*Attorneys and Counsel.*

15 COMMONWEALTH OF MASSACHUSETTS,  
*County of Suffolk, ss:*

Millard F. Field, being duly sworn, deposes and says that he has read the foregoing petition by him signed and knows the contents thereof; that the statements therein contained are true of his own knowledge, except as to those matters therein stated to be on information and belief, and as to such matters he verily believes it to be true.

Subscribed and sworn to before me this 15th day of June, 1910.

[SEAL.]

EVERETT S. EMERY,  
*Notary Public in and for said Commonwealth.*

16

EXHIBIT A.

Copy of the Patent Office Action of December 6, 1902, in the Second Colman Application, Serial No. 122,381.

17

EXHIBIT A.

2-260.

Div. —, Room 93.

All communications should be addressed to "The Commissioner of Patents, Washington, D. C."

A. W.

Paper No. 1, First Office Action.

*Colman Application, Paper No. 1.*

All communications respecting this application should give the Serial number, date of filing and title of invention.

DEPARTMENT OF THE INTERIOR,  
UNITED STATES PATENT OFFICE,  
WASHINGTON, D. C., *December 6, 1902.*  
Mailed " " "

Howard D. Colman, care L. L. Miller, 1237 Monadnock Block, Chicago, Ill.:

Please find below a communication from the Examiner in charge of your application, for Machine for Drawing in Warp Threads; filed September 6, 1902. Serial Number 122,381.

F. L. ALLEN,  
*Commissioner of Patents.*

The application has been examined.

The word "ele" on line 17 of page 3 of the specification should be changed to *eye*.

The word "eye" at the end of line 14 of page 6 should be changed to *harness*.

A brief description of Fig. 5 of the drawings should be made on page 7, and of Fig. 7a on page 8; also a description of Fig. 26a on page 10.

The statement on line 4 of page 10 that certain parts are shown in the drawings as of about actual size should be revised, in view of the fact that in the photolithographic reproductions of the drawings which go into general circulation the scale is reduced somewhat.

The clamp bars B3 and B4 should be indicated in Figs. 4, 5, and 7.

The matter at the top of page 13 should be amplified so as to describe the construction and arrangement of the toggle mechanism.

A detail view showing enlarged the roughened face of the slide B14 should be added to the drawings.

The arrangement of the lever B15 should be stated at the bottom of page 13.

The matter on lines 10 and 12 of page 14 should be amplified so as to disclose the arrangement and operation of the mechanism referred to on said lines.

The arrangement of the rollers C' and C2 should be stated on page 14.

An inaccuracy apparently is involved in the reference at the bottom of page 14 to the Figs. 40 and 41 of the drawing.

The location of the shaft C10 should be stated at the top of page 15.

The reference on line 6 of page 15 to the "raised ends" of the knife bars C7, C8, should be explained.

The arrangement of the springs C16 should be stated on line 8 of page 15.

It is desired that at an appropriate place there be introduced a brief description of the construction of the carriage C.

The mention on line 20 of page 21 of the "picker up finger" apparently involves an inaccuracy.

The reference on line 29 of page 25 to the third hook of the picker-up should be supported by appropriate illustration.

The final letter of the word "pushes" on line 16 of page 27 should be replaced by the letter *d*.

The hand lever N' mentioned on the line 21 of page 30 should be indicated in Fig. 1 of the drawings, as should be also the spring N5 mentioned on line 26.

The construction and arrangement of parts whereby the lower end of the finger P engages the pawl P2, as described at the bottom of page 32 and the top of page 33, should be made clear by an additional detail view showing such arrangement of parts.

The inclusion in claims 19 and 51 of a "sensitive feed" is indefinite and should be replaced by a statement more fully indicating the construction of the part sought to be covered.

The first word of line 7 of Claim 51 should be replaced by the word *needle*.

Claim 58 is thought to be of doubtful accuracy, it not being clear that the picker-up is provided with pockets each having an opening. It would seem that the difference between the features, if any such difference exists, is intangible.

It would seem that the clamping frame should be mentioned in positive and definite terms as an element of the combination sought to be covered by Claim 74, instead of being left to be implied as an element as at present through receiving merely incidental mention.

In order to render Claim 85 complete and operative the supporting means for the harness and the reed should be included as additional elements.

The reference to "unfinished work" in claims 94 and 95 is in-

definite and should be amplified by a statement reciting somewhat more clearly the actual arrangement and operation. It is suggested that the words "being engaged by" in claims 95, 96 and 97 be replaced by the word *engaging*.

The shaft *A2* should be indicated in Fig. 4 of the drawings, and the shaft *D* in Fig. 5.

The reference letters *L* and *K9* should be applied to the parts shown in Figs. *6a* and *6b* respectively.

The arm *N18* should be indicated in Fig. 38, and the bar  
20 *C8* in Fig. 45.

Claim 1 is met by the patent to Sherman et al., 255,038, March 14, 1882, and Sherman, 500,965, July 4, 1893, (Weaving, tying in warps) and is rejected.

Claims 2, 3 and 4 are met by the said patent of 1882 and are rejected.

Claims 11, 12, 18, 25 and 30 to 34 are met by the patent to Sherman, 500,966, July 4, 1893, and Sherman, 592,667, October 26, 1897, and Ingersoll, 590,008, September 14, 1897, same class, and are rejected. In the patents cited the action of the needle is to pull the warp thread through a part. Applicant's use of the term "putting" does not differentiate the constructions, and hence the rejection of the said claims.

Claim 26 is met by the patent 500,966 above cited considered in connection with the fact that the patent to Sherman 500,964, July 4, 1893, same class, shows a stripper. The said claim is rejected.

Claims 56 and 57 are not patentable over the form of picker-up shown by the patent 590,008, above cited, it involving no invention to provide a series of thread catches instead of the single one shown in the patent.

Claim 60 is fully met by the above cited patent, 590,008, and is rejected.

Claims 65 and 68 are substantially met by the above cited patent 592,667 and are rejected. The slightly different arrangement provided for does not involve invention.

I. U. TOWNSEND,  
*Examiner of Textiles.*

W. F. W.

21

## EXHIBIT B.

*Copy of Those Portions of Field's Petition to the Commissioner of Patents, Dated February 18th 1910, which Relate to the Revival of the Second Colman Application.*

22

## EXHIBIT B.

In the United States Patent Office.

Interference No. 26,590.

MILLARD F. FIELD

VS.

HOWARD D. COLMAN.

Subject: Warp Drawing Machine.

*Petition to the Commissioner of Patents in Person on Behalf of Millard F. Field.*

Your petitioner, Millard F. Field, a party to the above-entitled interference, respectfully shows:

1. That on June 23, 1898, your petitioner filed an application, Serial No. 684,201, for Improvements in Warp Drawing Machines, which application, on October 9, 1906, was placed in interference with an application filed by Howard D. Colman, May 18, 1906, Serial No. 317,547, entitled Improvements in Machines for Drawing in Warp Threads; that the said application of Colman is alleged to be a continuation of a second and earlier application, Serial No. 122,381, filed September 6, 1902, (abandoned May 28, 1906) and, furthermore, that said latter abandoned application is alleged to be a continuation of a still earlier application, Serial No. 526,856, filed October 24, 1894, (abandoned October 6, 1902), and that, in virtue of the alleged connection between the said several applications of Colman, the latter was made the senior party to the said interference and your Petitioner was notified that judgment of priority of invention on the record would be rendered against him in favor of said Colman.

\* \* \* \* \*

23 16. That, after the filing of the said second Colman application, Serial No. 122,381, on September 6, 1902, of which the third or last application, Serial No. 317,547, in interference, is alleged to be a continuation, action was taken by the Patent Office upon said second application (amounting to a rejection of said application) under date of December 6, 1902, of which notice was duly given to the applicant.

17. That, following such action of rejection the applicant, Colman, failed to prosecute the said second application within one year from the date thereof and, under the provisions of Section 4894 of the

Revised Statutes, the said application became abandoned on December 6, 1903.

18. That on January 11, 1904, the applicant Colman, through his attorney, seeking revival of the application, filed a petition to the Commissioner of Patents, as follows:—

Docket Clerk,  
Jan. 11, 1904,  
U. S. Patent Office.

Serial No. 122,381, Paper No. 2.

*Petition to Revive.*

DEPARTMENT OF THE INTERIOR,  
UNITED STATES PATENT OFFICE.

In the Matter of the Application of Howard D. Colman for a Patent  
Upon Improvements in Machines for Drawing in Warp Threads.  
Filed Sept. 6, 1902. No. 122,381.

Petition for Revival of Application.

Hon. Commissioner of Patents:

Your petitioner, Howard D. Colman, represents unto Your Honor that on September 6, 1902, he filed in the United States Patent Office an application for patent upon an improved Machine for Drawing in Warp Threads, which application on Dec. 7, 1903, became abandoned for failure to prosecute by formal amendment.

Your petitioner further represents that such failure to amend said application was wholly accidental and unintentional, and was not for the purpose of delay.

24 Your petitioner further represents that the invention set forth in said application is intricate; that the specification comprises thirty-two typewritten pages of descriptive matter and 119 claims, all but a few of which claims were substantially held allowable on the first Office action; and that the application contains eighteen sheets of drawings, most of which are extremely complex. To reproduce said drawings and refile said application would call for the expenditure of much time and money.

Wherefore your petitioner humbly prays that said application be revived upon such terms as Your Honor shall deem just and equitable.

Chicago, Illinois, January 9, 1904.

HOWARD D. COLMAN,  
By LUTHER L. MILLER,  
*Attorneys of Record.*

Petition granted.  
F. I. ALLEN,  
*Commissioner.*

January 18, 1904.

That such petition was accompanied by a letter from Luther L. Miller, Colman's attorney, as follows:—

Mail Room,  
Jan. 11, 1904,  
U. S. Patent Office.

Docket Clerk,  
Jan. 11, 1904,  
U. S. Patent Office.

CHICAGO, ILL., Jan. 9, 1904.

Hon. Commissioner of Patents, Washington, D. C.

SIR: I hand you herewith amendments in two applications in which I appear as attorney, which applications have inadvertently been permitted to become abandoned for failure to prosecute, accompanying each of said amendments with a petition and an affidavit setting forth the facts.

As the failure to file these amendments in proper time is wholly my own fault, I shall place my client in statu quo, the purpose of presenting the accompanying petitions being to save myself the cost of preparing and filing two heavy cases, if this is possible. The expense of preparing and filing these applications would be considerable, both in cash outlay and in time, and I believe no good purpose would be gained by this procedure unless it is necessary under the law. In my petitions and their accompanying affidavits I  
25 have set forth briefly the facts in the case, and I trust that you will see your way clear to give me at least partial relief in the premises. If, under the statute, the cases cannot be absolutely revived, will it not be possible for you to enter an order permitting the files of the present applications to be used as new applications upon payment of new filing fees?

I am extremely sorry to be obliged to trouble you with these matters. I endeavor to be prompt in my amendments, and believe the Examiners in your Office will confirm the statement that ordinarily I am so. I will endeavor to prevent the recurrence of an oversight such as I am obliged at this time to present to your attention.

Respectfully yours,

LUTHER L. MILLER.

That said petition was further accompanied by an affidavit by the said Miller as follows:—

*Affidavit.*

STATE OF ILLINOIS,  
County of Cook, ss:

Luther L. Miller, being duly sworn upon oath, doth depose and say that he is an attorney at law and a solicitor of patents; that on or about the 6th day of September, 1902, as attorney for one Howard D. Colman, of Rockford, Illinois, he filed in the United States Patent Office a certain application for patent upon an improved Machine for Drawing in Warp Threads, which application comprised thirty-two pages of descriptive specification, 119 claims, and eighteen sheets of drawings; that said application received Serial No. 122,381, in

the Patent Office; that on or about the 6th day of December, 1902, the Examiner having this application in charge acted upon it, and that on or about the 16th day of March, 1903, a personal interview was held by affiant with the Examiner, during the course of which interview an amendment along the lines of the one filed herewith was proposed by said affiant.

Affidavit further states that it is his practice to keep the files of cases pending in the Patent Office which are being conducted by him as attorney in a filing cabinet composed of drawers, and to keep a card index of such pending cases as a check upon said filing cabinet. Affiant further states that on account of the large size of said application No. 122,381 it was not placed in said filing cabinet, but was kept in a separate file box and in consequence of its absence from the regular filing cabinet the record of said application was inadvertently omitted from said card index.

Affiant further states that during July and August and a part of September 1903 he was absent from his office on a European business trip; that since returning to his office he has been busy with other matters in the practice of his profession; and that in a pressure of other business and in consequence of the absence from said card index of any record of said application affiant has overlooked the fact that the term within which amendment should have been made was about to expire and has expired.

Affiant further states that his said omission to amend said application was not intentional, but was wholly an oversight on his part, and was not and is not for the purpose of delaying the prosecution of said application.

LUTHER L. MILLER.

Subscribed and sworn to before me, at Chicago, Illinois, this 9th day of January, 1904.

[NOTARIAL SEAL.]

GEORGE L. CHINDAHL,  
*Notary Public, Cook Co., Ill.*

That the said petition was furthermore accompanied by an amendment purporting to be in response to said action of rejection of December, 1902.

19. That at the time the said petition for revival was filed a Patent Office rule was in force which had been promulgated by Commissioner Duell July 17, 1900 (92 O. G. 385) requiring a full showing of the reasons for reviving an application to be filed with a petition for revival and requiring the disposition of the case on such showing without being docketed for hearing and without oral argument, such order being as follows:—

*Revival of Abandoned Applications.*

DEPARTMENT OF THE INTERIOR,  
UNITED STATES PATENT OFFICE,  
WASHINGTON, D. C., *July 13, 1900.*

Notice is hereby given that petitions for the revival of abandoned applications will not be docketed for hearing. A full showing of

the reasons for reviving an application must be filed with the petition for revival, and the case will be disposed of on such showing without oral argument.

C. H. DUELL,  
*Commissioner.*

27 That accordingly the aforesaid affidavit, letter and amendment accompanying the petition for revival, constituted the entire showing on which action was taken upon the said petition for revival.

20. That following the practice the said petition for revival and the accompanying papers were referred to the Primary Examiner in charge of Division 21, in accordance with an order, copy of which is as follows:

2-074.

DEPARTMENT OF THE INTERIOR,  
U. S. PATENT OFFICE,  
WASHINGTON, D. C., *Jan'y 11, 1904.*

*Petition.*

Application of H. D. Colman. Serial No. 122,381. Invention:  
Machine for Drawing in Warp Threads.

Referred to the Examiner in charge of Division 21, who is directed to file an answer on the — day of — which answer shall exhibit the reasons, if any, why the request of the petition hereto attached should not be granted.

F. I. ALLEN,  
*Commissioner of Patents.*

17922b2m4—01.

That the said Primary Examiner thereupon, under date of January 12, 1904, submitted a report, copy of which is as follows:

Paper No. 3.

Copy sent to attorney.

In the United States Patent Office.

Petition to Revive.

In re Application of Howard D. Colman for Letters Patent for Machine for Drawing in Warp Threads. Filed September 6, 1902. Serial Number 122,381.

*Examiner's Statement.*

28 This is a petition to revive the above entitled application. That said application was filed September 6, 1902, and was rejected December 6, 1902. No response having been made to said rejection, the application became abandoned. As stated in

the affidavit accompanying the petition, the application comprises some 33 pages of descriptive specification and 119 claims, and 18 sheets of drawings. By the office action sixteen claims of the one hundred and nineteen were rejected.

Accompanying the petition and affidavit is a proposed amendment which is thoroughly responsive to the office action.

The affidavit states that the application became abandoned by reason of the fact that the attorney kept all the papers in a separate cabinet owing to the large size of the case and they were overlooked during the rush of business following a prolonged absence in Europe on a business trip. To present a new application involves a reproduction of the elaborate drawings and would entail a large expense upon the applicant, and likewise be a greater burden upon the office than would be the revival of the present application, since in a new application the specification would have to be minutely compared with the drawings, whereas this has been already done in the present case.

In view of the above facts it is recommended that the petition be granted and that the application be revived.

I. U. TOWNSEND,  
*Examiner of Textiles.*

(January 12, 1904.)

21. That on January 18, 1904, the then Commissioner of Patents granted the petition reviving the said application and caused such action to be endorsed upon the petition and notice to be sent to the applicant Colman, copy of which is as follows:

E. E. G.

Serial No. 122,381, Paper No. 5.

*Notice of Comm'r's Decision.*

Dated January 19, 1904.

DEPARTMENT OF THE INTERIOR,  
UNITED STATES PATENT OFFICE,  
WASHINGTON, D. C., — — —.

Petition to Revive.

In the Matter of the Application of Howard D. Colman. Machines for Drawing in Warp Threads. Filed Sept. 6, 1902. Serial No. 122,381.

SIR: You are hereby informed that the above petition has been granted by the Commissioner.

By direction of the Commissioner:

Very respectfully,

C. M. IRELAN,  
*Chief Clerk.*

F.

29 Howard D. Colman, c/o Luther L. Miller, 1237 Monadnock Block, Chicago, Ill.

3—2210A

22. That Section 4894 of the Revised Statutes is as follows:

"SEC. 4894. All applications for patents shall be completed and prepared for examination within one year after the filing of the application, and in default thereof, or upon failure of the applicant to prosecute the same within one year after any action therein, of which notice shall have been given to the applicant, they shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Commissioner of Patents that such delay was unavoidable."

That neither in the said petition, the said letter, nor the said affidavit, was there any showing of unavoidable delay, such as is required by the aforesaid Section 4894, as a prerequisite to the revival of an abandoned application; that under the rules of law established by the decisions of the Patent Office, and the courts having jurisdiction in cases arising under the Patent Acts, the record of the Colman application clearly, affirmatively, and conclusively shows that the delay causing its abandonment was not unavoidable and that the said order of revival was, therefore, *ultra vires* and void.

23. That the papers filed with the petition to revive contain affirmative showing of avoidable delay in the prosecution of the said application, an instance of such affirmative showing being the statement in the said affidavit that, as early as March 16, 1903, a personal interview had been held by Miller with the Examiner during

the course of which an amendment along the lines of the one  
30 filed with the petition to revive was proposed by Miller, and the further statement in Mr. Miller's letter that the failure to file the amendment in proper time was "wholly" Miller's "own fault;" that in the eye of the law Miller's fault was the fault of Colman himself, Miller being the attorney in fact of Colman.

24. That the said letter of Mr. Miller stated that the purpose of the petition for revival was to save "the cost of preparing two heavy cases;" that the said petition furthermore emphasized the intricacy of the invention, the length of the specification, the number of claims and sheets of drawings, the complexity of the drawings and the expenditure of time and money required to refile the application; that the Examiner's statement also particularly referred to the elaborateness of the drawings, the expense entailed upon the applicant in filing a new application, and especially the burden placed upon the Office through the examination of a new application as contrasted with the revival of the present application, and that the Examiner recommended a revival in view of such facts; that the recommendation of the Examiner, therefore, was based, and the petition was urged and apparently decided, wholly upon the ground of economy in time and labor to the Patent Office, and therefore as a mere matter of Office convenience, which ground was entirely outside of the purview of Section 4894 of the Revised Statutes.

25. That the authority vested in the Commissioner under Section 4894 of the Revised Statutes is a judicial authority; that the object to be accomplished and the evil intended to be remedied by

31 the enactment and amendment of the statute is clearly understood; that the intent of the statute is clear on its face to the effect that the Commissioner has no lawful authority to revive an abandoned application except upon proof, to a degree and in a manner that satisfied his judicial mind in accordance with the rules of judicial decision, of the existence of delay by the applicant that was unavoidable; that in this case there was no such proof, but, on the contrary, it clearly appears on the face of the record that the proof or showing was one of wilful and intentional delay and gross negligence, and that the action of the Commissioner in reviving such application in the face of such showing and as a matter of mere Office convenience was an abuse of the judicial power vested in him, and was an arbitrary act unwarranted by law.

26. That by a well established line of decisions both in the Patent Office and in the courts having jurisdiction under the Patent Acts, it has been settled that the negligence of the attorney or of the applicant is not unavoidable delay; that the decisions of the Commissioner as a judicial tribunal, both prior and subsequent to the said order of revival, were all in harmony with this view of the law; that the Commissioner as a judicial tribunal is bound by the doctrine of *stare decisis*, and that the departure of the then Commissioner in this case from the settled rule of judicial decision was a vital error in law which your Honor, sitting as a judicial tribunal and with the amplified record now before you, should correct.

27. That the present *inter partes* record which is now before your Honor shows that facts material and pertinent to the abandonment of the Colman application and to the delay in prosecuting the  
32 same, were withheld by the party Colman in his petition for revival, which facts, if then known to the Patent Office, would have resulted in a denial of the said petition to revive, and as now made known to Your Honor should move Your Honor to vacate the said order of revival.

28. That in the papers constituting the said petition for revival it was stated that the Colman application, of which revival was sought, was filed September 6, 1902, and it was stated in effect that there had been no delay in its prosecution; that it did not appear in the petition for revival, nor in the report of the Primary Examiner, nor in any of the files and papers submitted to the Commissioner at the time of the revival of the said application, that the said second application was or might be alleged to be a continuation of an earlier application, Serial No. 526,856, filed October 24, 1894, nor was any information furnished in the record of the second application at the time of its revival of the previous pendency of the said first application; that no claim nor other statement was made in the record of the second application whereby it could be ascertained that the latter was an alleged continuation of the said first application filed October 24, 1894, until a long time after the revival thereof, to wit, on July 21, 1905, when a statement to that effect was inserted in the specification by an amendment, copy of which is as follows:

## Amendment, Paper No. 7.

Mail Room,  
Jul- 20, 1905,  
U. S. Patent Office.

U. S. Patent Office,  
Div. XXL,  
Jul- 21, 1905,  
Textiles.

*Amendment.*

33

Room 112.

Howard D. Colman. Machine for Drawing in Warp Threads. Filed  
Sept. 6, 1902. No. 122,381.

Hon. Commissioner of Patents, Washington, D. C.

SIR: Please amend the Specification as follows: Page 7, after line 10, insert the following paragraph:

This application is a continuation of an application filed by me October 24, 1894, Serial No. 526,856, which said earlier application has been formally abandoned in favor of the present application.

Signed at Chicago, in the County of Cook and State of Illinois this 18th day of October, 1905.

HOWARD D. COLMAN,  
By LUTHER L. MILLER,  
*Attorney of Record.*

That the record, therefore, shows that such claim or allegation of continuity and all knowledge of or information as to the said first application was withheld from the Commissioner at the time of the revival of the said application, and that there was therefore no consideration of the alleged continuity at the time the said petition for revival was considered.

29. That on the partial facts then of record the Commissioner was led to believe erroneously that he was reviving the said second application, Serial No. 122,381, only as of its filing date, September 6, 1902, whereas, on the *inter partes* record, it is contended that the effect of such revival was to reinstate the said second application as of the filing date (October 24, 1894) of the said first application, eight years previous to the filing date of the second application.

34 30. That the Commissioner was led to believe on the partial facts then of record that the said second application which he was asked to revive had received but one action by the Patent Office, and that, when said petition to revive was filed, said application has then been pending but approximately one year and four months, whereas on the *inter partes* record it now appears that it had then been pending in effect for more than nine years.

31. That these facts should have been made known and, if known, should have been given great weight in determining the said petition to revive, and had they been known to the Commissioner at that time, as your petitioner believes, the said petition would have been denied.

32. That at the time of the abandonment of the said Colman application and at the time the said order of revival was made, your petitioner's application was duly pending, disclosing interfering matter and containing interfering claims, and that the duty had then devolved upon the Commissioner under the provisions of Section 4904 of the Revised Statutes of determining whether Field or Colman was to be adjudged the prior inventor; that the pendency of your petitioner's interfering application at that time should have required then and does require now the strictest application of the rule as to the proof of unavoidable delay on the part of Colman.

33. That the third or last Colman application, Serial No. 317,457, in interference, which was filed May 18, 1906, is in every material and substantial respect a duplicate of the prior abandoned application, Serial No. 122,381; that Colman, by filing the said  
35 duplicate application, recognized and accepted the actual and irretrievable abandonment in fact of the said prior application, No. 122,381, on December 6, 1903, and the illegality and ineffectiveness of its alleged revival in January 1904, and that such revival was without warrant in law or equity under the statutes made and provided.

34. That, your petitioner's application now in interference having been pending at the time the said Colman application became abandoned, your petitioner would now be senior party in the present interference had the said petition for revival been denied, with the right to take testimony in support of his claims to priority of invention should it become necessary to do so; that the order of revival constituted, in effect, an *ex parte* adjudication adverse to the rights of your petitioner in the present *inter partes* proceeding, and may constitute the basis of a final adverse decision in the said *inter partes* proceeding, cutting off his said right to take testimony; that judgment on the record may be rendered against your petitioner in the said *inter partes* proceeding by virtue wholly of an *ex parte* showing offered in an *ex parte* proceeding, a course which is repugnant to the principles of equity and to the practice of the Patent Office in interference cases; that the Commissioner has held that jurisdiction under Section 4894 of the Revised Statutes is vested directly in him; that an interference having been declared and the said order of revival directly affecting the question of priority of invention under Section 4904 of the Revised Statutes, the matter of  
the validity or invalidity of said revival should now be re-  
36 considered *de novo* upon the present record *inter partes* and the order of revival vacated.

35. That the said second and third Colman Applications, by reason of said negligent abandonment of said second application as aforesaid, are not continuous applications for the purpose of adjudication in this interference by any tribunal unless a patent issued to Colman on his said third application could and would be sustained in suit thereon in the courts having jurisdiction under the Patent Acts against a defence of statutory bars operating against the filing date of said third application and not against the filing date of said second application; and that the decisions of such courts as to the meaning and effect of R. S. Sec. 4894 under which said second

application became and was abandoned as aforesaid are conclusive to the effect that such patent to Colman could not be sustained against such defence as aforesaid.

36. That the present status of the said interference before said Examiner of Interferences as a consequence of said decision by said Examiner of Interferences is that said interference is closed to the taking of full *inter partes* testimony as to priority of invention, and that such procedure as is now open to your petitioner before said Examiner of Interferences is rendered incomplete and ineffective for the due and full protection of the rights of your petitioner.

\* \* \* \* \*

37 38. That by reason of the decision of the Examiner of Interferences on the continuity of the second and third applications as effected by the said order of revival, Field, except as he has remedy by this petition is forced to take statutory appeals upon an incomplete and imperfect record, and in virtue of the vital error of law respecting said revival he is thus forced to an expensive, prolonged, piece-meal and inconclusive consideration of the matters at issue.

38 Wherefore your Petitioner prays:

\* \* \* \* \*

Second. That on the basis of the present *inter partes* record Your Honor will reconsider and re-examine the matter of the revival of the Colman second application as aforesaid, and that on such reconsideration and re-examination Your Honor will vacate and reverse the order of revival heretofore made, and that Your Honor will, on the basis of the vacation and cancellation of such order of revival instruct the Examiner of Interferences that the burden of proof should be shifted and Colman be made the junior party on the basis of the filing date of his third application.

Respectfully,

MILLARD F. FIELD.

EMERY & BOOTH,

*Attorneys for Field.*

MELVILLE CHURCH,

*Associate Attorney for Field.*

39 COMMONWEALTH OF MASSACHUSETTS,  
*Suffolk —, ss:*

On the 14 day of February, A. D. 1910, appeared before me Millard F. Field, personally known to me and known to be the one who executed the foregoing petition, and he being by me duly sworn did depose and say that he had read the foregoing petition and that the facts stated in the same were true to his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believed it to be true. Before me,

EVERETT S. EMERY,  
*Notary Public.*

Due service of this petition and receipt of a copy thereof is hereby acknowledged this 18th day of February, A. D. 1910.

L. S. BACON,  
*Associate Attorney for Howard D. Colman.*

40

## EXHIBIT C.

*Copy of the Amendment as Filed and Entered to the Second Colman Application, Serial No. 122,381, Filed January 11, 1904, and Accompanying the Petition to Revive.*

41

## EXHIBIT C.

Mail Room,  
Jan. 11, 1904,  
U. S. Patent Office.

Docket Clerk,  
Jan. 11, 1904,  
U. S. Patent Office.

Amendment A, Paper No. 4, and Affidavit.

*Amendment A.*

Room 112.

Howard D. Colman. Machine for Drawing in Warp Threads. Filed  
Sept. 6, 1902. No. 122,381.

Hon. Commissioner of Patents, Washington, D. C.

SIR: Referring to Office Action of Dec. 6, 1902, herein:

Please amend the specification as follows:

*Page 3, line 15, cancel "independently of each other" and substitute,*

*A. —by independent mechanisms.*

*Page 3, line 17, change "ele-selecting" to —eye-selecting.*

*Page 6, line 14, change "eye" to harness.*

*Page 7 at the end of line 17 insert:*

*A'. Fig. 4 is a vertical section through the machine, taken on dotted line 4 4 of Fig. 1.*

*Page 7, line 18, change "Fig. 4" to Fig. 5.*

*Page 8, at the end of line 4 insert:*

*A<sup>2</sup>. Fig. 7a is a sectional view through one of the adjustable hooks for supporting the upper harness-bars. Fig 7b is a fragmental top plan view of the slidable portion of the straight-edge over which the threads are bowed.*

*Page 10, line 3, after "arms" insert:*

*A<sup>3</sup>. Fig. 26a is a sectional view through one of the roller bearing-blocks for engaging the periphery of the actuating cams,*

*At the bottom of page 11 add:*

A<sup>4</sup>. *Fig. 48 is a side view of the lower end of the finger P of the sensitive feed for the ward carriage.*

*Page 13, line 3, erase "and".*

*Page 13, at the end of line 4 erase the period and add, and the transverse frame-arms B23.*

42 *Page 13, cancel lines 5 to 13, inclusive, and substitute:*

A<sup>5</sup>. The warp threads pass transversely across the face of the carriage between the two clamp bars B3 and B4. The threads are bowed outward slightly from a right line by the protruding straight-edge B2. The clamp bar B3 at the upper side of the carriage is pivotally connected with the frame of said carriage, and is susceptible of a slight swinging movement relative to the frame of the carriage and the clamp bar B4. This movement of the clamp bar B3 is effected by means of the toggle levers B5 pivotally connected at their opposite ends with arms B15 fixed on an oscillatory shaft B19 and with ears B20 projecting from the clamp bar B3, respectively. The oscillatory shaft B19 is moved by a hand lever B6, and by means of the toggle levers B5 and their connections just described the clamp bar B3 is moved away from the clamp bar B4 sufficiently to draw the warp threads on the carriage taut between said clamp bars and bowed intermediate their ends over the straight-edge B2. The clamps for holding the

*Page 13, line 28, change "the" to a. At the end of said line add,*

A<sup>6</sup>. *pivotally connected with one end of said sliding piece and pivotally supported upon the straight-edge B2*

*Page 13, line 29, erase "and its purpose" and substitute:*

*The purpose of the sliding piece B14.*

*Page 14, cancel lines 8 to 12, inclusive, and substitute:*

A<sup>7</sup>. to correspond with the threaded feed-shaft B1, is fixed to one end of a lever B17 pivotally mounted upon one of the frame-arms B23 of the warp carriage, and is arranged to be thrown into and out of engagement with the threads  
43 upon said feed-shaft by means of an eccentric B 21 rotatably supported in the opposite end of the lever B17, said eccentric lying with an elongated slot B22 in said frame-arm.

*Page 14, line 21, after "plate" insert:*

A<sup>8</sup>. The rollers C1 rotate upon horizontal axes and support the weight of the carriage C, while the rollers C2 turn upon vertical axes and prevent lateral movement of the lower edge of said carriage.

Page 14, lines 27 and 28, change "40 and 41" to 43 and 44.

Page 14, line 25, after "harnesses" insert:

A<sup>9</sup>. These horizontal bars C4 and C5, with the end-members C20 and the rear extension C3, constitute the framework of the carriage C.

Page 15, line 1, after "C<sup>10</sup>" insert:

journaled in the carriage C and

Page 15, line 6, after "ends" insert C21.

Page 15, line 8, after "springs C16" insert, secured to the end members C<sup>20</sup> of said carriage.

Page 21, line 20, change "picker-up" to puller. Same line after "finger" insert now.

Page 27, line 16, change "pushes" to pushed.

Claim 1, line 4, before "means" insert —automatic.

Same line after "harness" insert

independently of the reed.

Claim 2, line 4, after "moving the reed" insert

independently of the harness.

Claim 3, line 5, after "and" insert

means for moving.

Same line after "reed" insert independently of each other.

44 Claim 11, line 2, cancel "vibratory". Line 3, cancel "vibratory", and after "picker-up" insert, vibratory under the tension of a warp thread.

Claim 12, line 2, cancel "vibratory". Line 4, cancel "vibratory picker-up finger" and substitute picker-up vibratory under the tension of a warp thread.

Claim 18, line 2, after "picker-up" insert vibratory under the tension of a warp thread.

Same line, erase "vibratory".

Amend Claim 19 to read as follows:—

A<sup>10</sup>. 19. In a machine for drawing in warp threads, in combination, a picker-up; a vibratory needle for putting a warp thread through an eye of the harness; a warp carriage; "a mechanism for feeding the warp carriage" adapted to be withheld from operation by the proximity to said mechanism of a warp thread, and means for facing a harness eye.

Claim 25, line 2, erase "vibratory". Line 3, after "carriage" insert means for feeding said carriage.

Same line, after "picker-up" erase the semicolon and add, vibratory under the tension of a warp thread;

Claim 26, line 4, after "stripper" insert for the picker-up.

Claim 30, line 2, erase "vibratory". Line 4, after "needle" insert,

A<sup>11</sup>. which means comprises a picker-up vibratory under the tension of a warp thread.

*Claim 31, line 4, after "needle" insert,*

*A<sup>12</sup>. which means comprises a picker-up vibratory under the tension of a warp thread.*

*Claim 32, line 4, after "needle" insert*

*A<sup>13</sup>. which means comprises a picker-up vibratory under the tension of a warp thread.*

*Claim 33, line 4, after "needle" insert*

*A<sup>14</sup>. which means comprises a picker-up vibratory under the tension of a warp thread.*

*Claim 34, line 4, after "needle" insert,*

*A<sup>15</sup>. which means comprises a picker-up vibratory under the tension of a warp thread.*

45 *Claim 51, lines 3 and 4, cancel "a sensitive feed for said carriage" and substitute,*

*A<sup>16</sup>. a mechanism for feeding the warp carriage, adapted to be withheld from operation by the proximity to said mechanism of a warp thread.*

*Claim 51, line 7, change "need;e" to needle.*

*Claim 56, after "thread-catches" insert, of different sizes.*

*Cancel claim 58.*

*Claim 60, line 1, after "picker-up" insert, vibratory under the tension of a warp thread.*

*Line 3, change "vibrating" to reciprocating.*

*At the end of claim 65, erase the period and add,*

*A<sup>17</sup>. which the picker-up may enter upon the failure of said picker-up to engage a warp thread.*

As pointed out in a personal interview with the Examiner the elements of claim 68 are not found in the reference 592,667.

*Claim 74, line 2, after "frame" insert said clamping frame.*

*Claim 85, line 2, after "reed" insert,*

*A<sup>18</sup>. means for supporting said harness, means for supporting said reed;*

Please amend claim 94 to read as follows:

*A<sup>19</sup>. 93. In a feeding device for an operating mechanism, in combination, a carriage; said operating mechanism; means for producing an advance movement of said carriage; a finger for engaging a portion of the substance to be treated;*

and means controlled by the movement of said finger for actuating said advancing means for said carriage.

*Claim 95, line 4, cancel "being engaged by the unfinished work of the machine" and substitute,*

A<sup>20</sup>. *engaging a portion of the substance to be treated.*

*Claim 96, line 5, change "being engaged by" to engaging.*

46 *Claim 97, line 5, change "being engaged by" to engaging.*

Favorable reconsideration of the rejected claims is respectfully requested.

*Please renumber claims 59 to 119 as 58 to 118.*

Signed at Chicago, In the County of Cook and State of Illinois, this 6th day of January, 1904.

HOWARD D. COLMAN,  
By LUTHER L. MILLER,  
*Attorney of Record.*

47 EXHIBIT D.

*Copy of the Decision of May 31, 1910, by the Commissioner of Patents on Field's Petition of February 19, 1910.*

48 March 31, 1910.

S. E. T.

In the United States Patent Office.

FIELD  
VS.  
COLMAN.

Patent Interference No. 26,590.

*Petition.*

Warp Drawing Machines.

Application of Millard F. Field filed June 23, 1898, No. 684,201.

Application of Howard D. Colman filed May 18, 1906, No. 317,547.

Messrs. Emery & Booth and Mr. Melville Church for Field,  
Messrs. Dodge & Sons of counsel.

Mr. L. L. Miller and Mr. L. S. Bacon for Colman.

This is a petition by Field praying:

"First: That on the basis of the present *inter partes* record Your Honor will reconsider and reexamine the legal question of the al-

leged continuity between Colman's first and second applications, and that on such reconsideration Your Honor will instruct the Examiner of Interferences that, as a matter of law, said second application with reference to the counts of this interference is not a continuation of said first application, and that, therefore, the burden of proof should be shifted and Colman be made the junior party on the basis of the filing date of his second application.

"Second: That on the basis of the present *inter partes* record Your Honor will reconsider and reexamine the matter of the revival of the Colman second application as aforesaid; and that on such reconsideration and reexamination Your Honor will vacate and reverse the order of revival heretofore made, and that Your Honor will, on the basis of the vacation and cancellation of such order of revival instruct the Examiner of Interferences that the burden of proof should be shifted and Colman be made the junior party on the basis of the filing date of this third application."

The record shows that Colman's original or first application was filed October 24, 1894; that on September 6, 1902, Colman  
49 filed a second application and subsequently abandoned his first application; that on May 18, 1906, he filed a third application, No. 317,547, the one involved in this interference, and subsequently, on May 28, 1906, formally abandoned the second application.

In declaring the present interference involving the last application of Colman and the application of Field filed June 23, 1898, Colman was made the senior party in view of the filing date of his original application. The preliminary statement filed by Field failed to overcome the filing date of the earlier Colman application and the Examiner of Interferences required Field to show cause why judgment should not be rendered against him on the record.

In response to the order to show cause Field filed a motion to dissolve the interference and to amend the issue under Rule 109, and a motion to shift the burden of proof.

As a result of the decision of the Primary Examiner upon the first mentioned motion the interference was continued as to a portion of the original counts and certain new counts were added.

The motion to shift the burden of proof was denied by the Examiner of Interferences on January 26, 1910. The next action in the interference proceedings was the filing of the present petition or appeal by Field on February 18, 1910, as a substitute for a prior petition filed by him on December 29, 1909. In denying Field's motion to shift the burden of proof, the Examiner of Interferences held that the invention of the issue is disclosed in the Colman application of 1894, that the subsequent applications of Colman are related thereto as continuing applications, and that Colman was therefore entitled  
to the benefit of the filing date of his original application.

50 The Primary Examiner also found it necessary to pass upon the continuity of the Colman applications in considering the ground of Field's motion to dissolve the interference which alleged that the counts of the issue are unpatentable. He stated in his decision (page 30):

"The patentability of these counts to Colman, in so far as he has the right to make the claims corresponding thereto, depends largely upon the effective date granted him as the filing date of an application fully showing and describing the intention set forth in the counts of the issue."

The Primary Examiner also reached the conclusion that the above mentioned applications of Colman are continuing applications and that he is entitled to the benefit of the filing date of the 1894 application, and as a result of this holding the Primary Examiner found that certain counts of the issue are patentable to Colman. Field's petition is virtually an appeal from said decision, for it seeks a review of the ground upon which the Primary Examiner held the counts patentable. Under the provisions of Rule 124, however, no appeal is permitted from a favorable decision on patentability by the Primary Examiner.

Rule 122 specifically provides that no appeal will be entertained from the decision of the Examiner of Interferences on a motion to shift the burden of proof, but that the matter may be reviewed on appeal from the final decision on priority, according to the last paragraph of said rule which reads as follows:

"Motions to shift the burden of proof should be made before, and will be determined by, the Examiner of Interferences. No appeal from the decision on such motions will be entertained, but the matter may be reviewed on appeal from the final decision upon the question of priority of invention."

That it is the practice of this office since the promulgation of the above provision of Rule 122 to review the decision of the Examiner of Interferences on motions to shift the burden of proof only in connection with his final decision on priority clearly appears from the following decisions of the Commissioner:

51 McGill vs. Adams, 119 O. G., 1259,  
Scott vs. Southgate, 121 O. G., 689,  
Dukesmith vs. Corrington vs. Turner, 125 O. G. 348,  
Hewitt vs. Thomas vs. Kruh vs. Weintraub, 122 O. G.  
1045.

While the present action of Field is not designated an appeal from the decision of the Examiner of Interferences on the motion to shift the burden of proof, but purports to be a petition addressed to the Commissioner under the general provisions of Rules 153 and 212, it seeks a review of the decision of the Examiner of Interferences on said motion. Rules 153 and 212 expressly state that they are only applicable to cases not provided for in the rules. Admittedly, Rule 122 covers the present case. In Hicks vs. Costello, 103 O. G. 1163, and Woods vs. Waddell, 106 O. G. 2017, it is expressly stated that the Commissioner will exercise his supervisory authority under Rule 212 only under extraordinary circumstances, and that this rule applies only where other rules are inapplicable, and is not intended as a means for evading the requirements of other rules.

Petitioner, however, contends that in the present case Rule 122

provides inadequate relief for the reason that if record judgment is entered, it may result in a long line of appeals being taken therefrom only to have the case sent back for the taking of proofs if the record decision is ultimately reversed. This argument so far as it is pertinent to the present case would apply to every case where a party was under order to show cause why judgment on the record should not be rendered against him, and his motion to shift the burden of proof is denied by the Examiner of Interferences. It furnishes no sufficient reason why the regular orderly course of procedure should be waived.

52 In the present case a decision denying Field's petition would be an interlocutory decision from which no appeal would lie to the Court of Appeals of the District of Columbia, and it would be necessary for him to await the entry of the judgment of priority and then to pursue the regular course of appeal before he could carry the case to the Court of Appeals. In that course of appeals the party Field would be denied the right and the lower tribunals would be deprived of the privilege of independent consideration of the question presented, by reason of the prior decision of the Commissioner on this petition.

On the other hand, a decision granting Field's petition would not apparently result merely in the return of the case for the taking of evidence. In his decision upon Field's motion to dissolve the interference the Primary Examiner, as heretofore noted, found it necessary to pass upon the question of the continuity of the Colman applications and his decision in part is based upon his holding that said applications constitute continuing applications. Apparently, a decision favorable to Field upon this petition would necessitate the return of the case to the Primary Examiner for a revision of his decision. It does not therefore appear that the argument of Field is well founded that a present determination of the question raised would result in expediting the final determination of the case.

The petition is dismissed as to the first ground.

The second ground of Field's petition is based upon the following state of facts: The Colman application No. 122,381, filed September 6, 1902, received its first action by the Patent Office on December 6, 1902, when the Primary Examiner rejected several of the  
53 claims. No action was taken by Colman until January 11, 1904, when he filed an amendment responsive to the Office action, accompanied by a petition to revive the application and an affidavit of his attorney. In said affidavit affiant states, *inter alia*:

"Affiant further states that it is his practice to keep the files of cases pending in the Patent Office which are being conducted by him as attorney in a filing cabinet composed of drawers, and to keep a card index of such pending cases as a check upon said filing cabinet. Affiant further states that on account of the large size of said application No. 122,381, it was not placed in said filing cabinet, but was kept in a separate file box and in consequence of its absence from the regular filing cabinet the record of said application was inadvertently omitted from said card index.

"Affiant further states that during July and August and a part of September of 1903, he was absent from his office on a European business trip; that since returning to his office he has been busy with other matters in the practice of his profession; and that in a pressure of other business and in consequence of the absence from said card index of any record of said application affiant has overlooked the fact that the term within which amendment should have been made was about to expire and has expired."

Upon the showing presented Commissioner Allen revived the application.

Although petitioner contended both before the Primary Examiner and the Examiners-in-Chief that said revival of the Colman application was unwarranted, the lower tribunals stated that the matter was one entirely within the jurisdiction of the Commissioner and declined to consider the matter.

The rules of practice contain no provision under which this ground of the petition may be raised, except under Rule 212, and in view of the fact that the regular and orderly procedure established by the rules of practice will not be violated by the present consideration of this matter, this ground of the petition will be given such consideration as it is deemed entitled to.

Petitioner contends that the Commissioner exceeded his  
54 authority in reviving the application upon the showing made in excuse of the failure to act upon the case within the year.

Section 4894 of the Revised Statutes provides that when no action is taken by applicants upon pending applications within a year "they shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Commissioner of Patents that such delay was unavoidable."

The petition of Colman to revive his application was granted by the former Commissioner of Patents and evidently the showing satisfied him that the delay was unavoidable within the meaning of section 4894 of the Revised Statutes. This statute conferred upon him authority to revive the application if he was satisfied that the delay was unavoidable. There is nothing to show that the Commissioner was deceived or misled as to the facts in the case (*Kinsman v. Strohm*, 120 O. G., 2127).

Rule 144 of the Rules of Practice provides:

"144. Cases which have been deliberately decided by one Commissioner will not be reconsidered by his successor except in accordance with the principles which govern the granting of new trials."

It is thought that the circumstances of the present case are such as to justify a reconsideration of the decision of the former Commissioner under the above rule.

The facts in the present case are very similar to those in the case of *ex parte Curtis*, 138 O. G., 767, which were held sufficient to warrant the revival of the application by the present Commissioner. In that case the applicant did not respond to the office action of June 8, 1907, until July 9, 1908, and the delay was due to the fact that the file of the application was misplaced in the attorney's office. The conclusion reached by the present Commissioner in the above case

55 indicates that if the present case had come before him in the first instance, he would not have reached a different conclusion from that which was reached by his predecessor. It may be said, however, that even if the present Commissioner were inclined to differ with his predecessor as to his finding of facts, that would not be ground for setting aside the decision reviving the case, since such decision was rendered by the former Commissioner in the exercise of judicial authority conferred upon him by the Statute.

In the case of *Kinsman vs. Strohm* 136 O. G., 1769, 31 App. D. C., 581, the Court of Appeals of the District of Columbia said, concerning the denial by the Commissioner of a motion of Kinsman to strike Strohm's application from the file on the ground that its revival was obtained through fraud:

"The contention is made on behalf of Kinsman that the Commissioner erred in not striking Strohm's application from the files. It appears that during its pendency in the Office the application became abandoned by failure to prosecute, and that upon proper showing it was subsequently reinstated by the Commissioner. Kinsman based his motion to strike Strohm's application from the files on the ground that its reinstatement was obtained through fraud. The testimony bearing on this question was carefully considered by the Commissioner and held not to sustain Kinsman's contention. We are satisfied that there has been no abuse of power on the part of the Commissioner in respect to this motion, and, therefore, decline to interfere with the exercise of his discretion. (In *re Atkins & Co.*, 29 App. D. C. 385; *Richards v. Meissner*, C. D. 1905, 595; 114 O. G., 1831; 24 App. D. C., 309; *American Stove Co., v. Detroit Stove Works et al.*, ante, 407; 134 O. G., 2245)."

In the present case, it is not alleged that the revival of the Colman application was obtained through fraud nor does it appear that there was any abuse of discretion on the part of the Commissioner in reviving the application. From the fact that in his petition to revive the application Colman referred to the size of the application and the cost and labor of duplicating the papers, while the Examiner in his answer to said petition stated that the filing of a new application would entail a greater burden upon the office than would the revival of the application, it does not follow, as alleged by Field, that these statements form the basis upon which the application was revived. There is nothing whatever to indicate that it was done as a mere matter of office convenience to economize time and labor, nor is it thought that the presence or absence in the mind of the Commissioner of knowledge of the prior Colman application would have made any difference in the decision of the Commissioner, as contended by Field.

For the reasons stated above, the petition of Field is dismissed as to the first ground and denied as to the second ground.

C. C. BILLINGS,  
*First Assistant Commissioner.*

May 31, 1910.

57

*Rule to Show Cause.*

Filed June 16, 1910.

In the Supreme Court of the District of Columbia.

At Law. No. 52700.

MILLARD F. FIELD, Petitioner,  
versus

CORNELIUS C. BILLINGS, Acting Commissioner of Patents,  
Respondent.

Upon consideration of the petition for the writ of certiorari in the above-entitled cause, it is ordered on this 16th day of June A. D. 1910, that the respondent herein show cause on the 1st day of July A. D., 1910, at the opening of the court, why the writ of certiorari should not issue as in and by the said petition prayed, provided that a copy of this order and of said petition be served upon the respondent on or before the 20th day of June, A. D., 1910; and that further proceedings in the interference be stayed until the determination of said petition.

HARRY M. CLABAUGH,  
*Chief Justice.*

*Marshal's Return.*

Served copy of within rule to show cause, together with copy of petition in this cause, on Cornelius C. Billings, Acting Commissioner of Patents, personally.

June 16, 1910.

AULICK PALMER, *Marshal.*  
S.

58

Filed June 30, 1910.

In the Supreme Court of the District of Columbia.

At Law. No. 52700.

MILLARD F. FIELD, Petitioner,  
v.

CORNELIUS C. BILLINGS, Acting Commissioner of Patents

*Rule to Show Cause.*

*Answer of Respondent.*

To the Honorable Justices of the Supreme Court of the District of Columbia:

The respondent, Cornelius C. Billings, Acting Commissioner of Patents, especially reserving unto himself all benefit of any exception

to the uncertainties and defects of the petition filed herein, and to the lack of jurisdiction of this court over him to grant the writ of certiorari to compel him to certify the records and documents referred to in said petition to this court, and of the lack of jurisdiction of this court to review the matters passed upon by this respondent involving the exercise of his judgment and discretion, and objecting to the lack of jurisdiction to interfere with this respondent in the course of his quasi-judicial duties, and especially excepting to the failure of the said petition to show any right on the part of the petitioner to the relief prayed for, and objecting to the lack of status on behalf of the petitioner to maintain his suit, nevertheless  
59 makes answer to the rule to show cause and to the said petition as follows:

1. Respondent admits on information and belief that the allegation contained in paragraph 1 of the petition is true, except that the records of this office show that petitioner's application has been assigned.

2. Respondent admits that the allegation made in paragraph 2 of the petition is true.

3. Answering paragraph 3 of the petition respondent admits that on June 23, 1898, petitioner filed in the United States Patent Office application No. 684,201 for letters patent for an alleged invention on certain new and useful improvements in warp-drawing machines, as alleged by petitioner. Concerning the statement in said paragraph that petitioner believed and still believes that the remaining allegations of said paragraph are true, respondent states that he is not informed and can neither affirm nor deny the same, but respondent avers that on October 24, 1894, one Howard D. Colman filed an application for the same broad invention as that of the Field application filed in 1898, mentioned above.

4, 5, 6, 7, 8, 9. Respondent admits on information and belief that the allegations of paragraphs 4, 5, 6, 7, 8 and 9 of the petition are true.

10. Respondent admits on information and belief the allegations of paragraph 10, except the statement that "action was taken by the Patent Office upon such second application, amounting to a rejection thereof," and avers that a more accurate statement would be that by said office action a small portion only of the claims of said application was rejected.

11. Respondent admits the allegation contained in paragraph 11, except the statement that "said application thereby became  
60 abandoned on December 6, 1903," and avers that an accurate statement would be that said application would have become abandoned on December 6, 1903, had it not been shown to the satisfaction of the Commissioner of Patents that the delay in prosecuting the application was unavoidable.

12. Respondent admits on information and belief the allegations contained in paragraph 12 of the petition, it being understood that where the words "Commissioner of Patents" are used in said paragraph, petitioner means to refer thereby to former Commissioner of Patents Frederick I. Allen.

13, 14, 15. Respondent admits the allegations contained in paragraphs 13, 14 and 15 of the petition.

16. Respondent admits that so far as he has observed the exhibits mentioned in this paragraph are copies of the original records contained in this office.

17. Respondent admits the allegations contained in paragraph 17 of the petition, except that in "Exhibit D" referred to in said paragraph and annexed to the petition, the word "not" before "thought" in line 1 of the next to the last paragraph on page 7 of said exhibit has been omitted. To correspond with the original record of this office said paragraph should read as follows:

"It is *not* thought that the circumstances of the present case are such as to justify a reconsideration of the decision of the former Commissioner under the above rule."

18. Respondent admits in so far as he has observed that the exhibits mentioned in this paragraph are authentic copies of original records in this office, except in the particular mentioned above in the answer to paragraph 17.

19. Respondent admits the allegation contained in paragraph 19 of the petition.

20. Respondent denies the allegations set forth in paragraph 20 of the petition. Further answering said paragraph respondent avers that section 4894 of the Revised Statutes which reads as follows:

"SEC. 4894. All applications for patents shall be completed and prepared for examination within one year after the filing of the application, and in default thereof, or upon failure of the applicant to prosecute the same within one year after any action therein, of which notice shall have been given to the applicant, they shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Commissioner of Patents that such delay was unavoidable,"

provides that applications not prosecuted within the year "shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Commissioner of Patents that such delay was unavoidable." Respondent denies that "said revival was made on a verified showing on the part of said Colman of wilful and intentional delay and of gross negligence and without any showing whatever of the existence of 'unavoidable delay,' " as alleged in the petition. Respondent states that in support of Colman's petition to revive his application, there was filed the affidavit of Luther L. Miller, attorney for Colman (see petitioner's Exhibit D), and that in said affidavit affiant averred that:

"Affiant further states that it is his practice to keep the files of cases pending in the Patent Office which are being conducted by him as attorney in a filing cabinet composed of drawers, and to keep a card index of such pending cases as a check upon said filing cabinet; Affiant further states that on account of the large size of said application No. 122,381, it was not placed in said filing cabinet, but was kept in a separate file box and in consequence of its absence

from the regular filing cabinet the record of said application was inadvertently omitted from said card index.

“Affiant further states that during July and August and a part of September of 1903, he was absent from his office on a European business trip; that since returning to his office he has been  
62 busy with other matters in the practice of his profession; and that in the pressure of other business and in consequence of the absence from said card index of any record of said application affiant has overlooked the fact that the term within which amendment should have been made was about to expire and has expired.” Respondent avers that this affidavit as to why the application was misplaced and overlooked in the attorney’s office, notwithstanding the checks and precautions taken to avoid such an occurrence set forth in the affidavit, constitutes a satisfactory showing of unavoidable delay within the meaning of Section 4894 of the Revised Statutes, and that it was upon this showing, which was quoted in his decision, that the respondent reached the conclusion that no error had been committed by the former Commissioner in reviving the application.

Respondent further answering said paragraph states that while it is true that the report of the primary examiner on the petition to revive states *inter alia* that the examination of a new application would prove a greater burden upon the office than would result from the revival of the old application, respondent avers that there is nothing whatever to indicate that this statement in any way constituted the ground upon which the application was revived. Respondent further avers that while the order of the former Commissioner reviving the application does not state the grounds upon which it was made, there is every reason to believe that it was based upon the verified showing made in the affidavit of Miller, quoted above, which showing is similar to that which has been accepted in other cases as a satisfactory showing of unavoidable delay within the meaning of section 4894 of the Revised Statutes, rather than upon the statement concerning office convenience contained in the report of the primary examiner.

63 21. Answering paragraph 21 of the petition, respondent denies that the record shows that the Commissioner had no statutory power or jurisdiction to enter an order reviving the second Colman application and that the act of the Commissioner in reviving said application “was an arbitrary act unwarranted by law and the Patent Office rules, in excess of the jurisdictional power of said Commissioner, and prejudicial to the rights of your petitioner,” as alleged in this paragraph. On the contrary, respondent avers that under the provisions of section 4894 of the Revised Statutes the power and jurisdiction to revive applications are vested in the Commissioner of Patents and that when it is shown to his satisfaction that the delay was unavoidable, it becomes his duty under this statute to hold the application not abandoned, also that the record shows that his act in reviving the Colman application was not in excess of his jurisdictional power.

22. Answering paragraph 22 of the petition, respondent denies

that the allegations contained therein are true for reasons similar to those given in the answer to paragraph 21.

23. Answering paragraph 23 of the petition, respondent denies that the order of revival and respondent's refusal to vacate said order necessarily fixes the date of Colman's invention, for purposes of judgment of priority over Field, as of the date of the first Colman application of October 24, 1894, instead of the date of the third Colman application of May 18, 1906, and will require all the tribunals of the Patent Office to render judgment of priority of invention in the interference against the petitioner and in favor of Colman, as

64       alleged in this paragraph. Respondent states that this would be the effect only in case the Colman applications constitute continuing applications or are so related in subject-matter as to entitle Colman to the benefit of his first application as a constructive reduction to practice of the invention of the issue. Respondent further states that petitioner contends that said Colman applications are not so related and in his petition of February 18, 1910, before the Commissioner of Patents prayed not merely that the order reviving the Colman application be set aside, but also that the Commissioner consider the question of the continuity of the Colman first and second applications and reverse the decision of the examiner of interferences holding that such applications are so related. Respondent further states that he refused to pass on the question of the continuity of the Colman applications upon petition, since the question related directly to that of priority of invention and petitioner had the right to urge the matter at final hearing on priority of invention, as fully appears from his decision rendered May 31, 1910, and constituting petitioner's Exhibit D.

Concerning the allegation that Colman claims the revival of his applications "will also justify and require the Court of Appeals of the District of Columbia upon appeal from the final judgment of the Commissioner to render judgment of priority of invention in respect to the issues of said interference against your Petitioner and in favor of said Colman," respondent states that he is not informed and cannot answer the same, but respondent states that petitioner himself nowhere alleges that such will be the effect of the order of revival. Respondent states on information and belief that it is petitioner's contention that he has the right to urge the question

65       of the legality of the revival of the Colman application before the Court of Appeals of the District of Columbia on appeal on priority of invention in the interference. While the allegation of the petitioner "that the said order of revival and said judgment refusing to vacate the same are not now, at the present stage of the proceedings of said interference, reviewable by direct appeal to the Court of Appeals of the District of Columbia," is probably true, respondent states that on appeal on priority in the case of *Kinsman v. Strohm*, 136 O. G., 1769, 31 App. D. C., 581, the Court of Appeals of the District of Columbia said:

"The contention is made on behalf of *Kinsman* that the Commissioner erred in not striking *Strohm's* application from the files. It appears that during its pendency in the Office the application be-

came abandoned by failure to prosecute, and that upon proper showing it was subsequently reinstated by the Commissioner. Kinsman based his motion to strike Strohm's application from the files on the ground that its reinstatement was obtained through fraud. The testimony bearing on this question was carefully considered by the Commissioner and held not to sustain Kinsman's contention. We are satisfied that there has been no abuse of power on the part of the Commissioner in respect to this motion, and, therefore, decline to interfere with the exercise of his discretion. (In re Atkins & Co., 29 App. D. C., 385; Richards v. Meissner, C. D., 1905, 595; 114 O. G., 1831; 24 App. D. C., 309; American Stove Co. v. Detroit Stove Works et al., ante 307; 134 O. G., 2245.)"

Concerning the allegation in this paragraph that *Colman* contends that said order of revival and the judgment of respondent refusing to vacate the same are not reviewable upon appeal on priority to the Court of Appeals, but are final with the Commissioner and not reviewable on appeal, respondent states that he is not informed and can neither affirm or deny the same. Furthermore, respondent states that the contention of Colman, whatever it may be, does not appear to be of consequence in this proceeding, especially as Colman is not a party thereto.

Respondent calls attention to the fact that petitioner himself nowhere alleges that he has not a right to a review of the question of the abandonment of the second Colman application on appeal on priority in the interference to the Court of Appeals; also that petitioner admits in this paragraph that he has a remedy and can obtain a review of the Commissioner's action on the question of revival of the Colman application by a bill in equity under section 4915 of the Revised Statutes, but complains that before he can obtain such review "he will be forced to go through a long protracted and inconclusive course of proceedings upon the question of priority of invention upon the present record before the Examiner of Interferences, the Board of Examiners-in-Chief, the Commissioner of Patents, and possibly before the Court of Appeals of the District of Columbia;" and respondent avers that in view of petitioner's contention and admission that he has other available remedies, his petition for writ of certiorari should be dismissed.

Respondent denies the allegation near the close of this paragraph that petitioner's right to a review of the Commissioner's order and judgment reviving Colman's application by writ of certiorari is clear and that no other prompt and adequate remedy is open to petitioner. Respondent avers, on the contrary, that petitioner has shown no right to said writ of certiorari; also, that judgment on priority in the interference in favor of Colman has already been entered by the examiner of interferences, and a limit of appeal set, and that it would have been possible for petitioner to carry the case to the Court of Appeals of the District of Columbia and obtain their judgment upon the question of the revival of the Colman application by appeal on priority regularly taken in the interference, if the Commissioner's action in reviving the application is reviewable at all by the courts, as speedily as would be possible through this certiorari proceeding.

67 As further answer to the order to show cause why the writ of certiorari prayed for should not be granted, respondent avers that under the ruling of this court in *United States ex rel. National Phonograph Company v. Allen*, 101 O. G., 1133, no third party or mere member of the public has such an interest in the revival of an application or the grant of a patent on a pending application as would warrant the courts in entertaining his petition for a writ of mandamus or certiorari; that as appears from the petition of Field, his interest in the matter of the revival of Colman's application is due to the fact that he and Colman are rival inventors seeking patents for the same invention and involved in interference proceedings having for its purpose the determination of which party is the prior inventor and therefore entitled to the patent. Moreover, respondent states that Colman is not now seeking a patent on his application No. 122,381, of 1902, alleged by Field to have become abandoned and improperly revived by the Commissioner; that this application was voluntarily abandoned by Colman in 1906 in favor of his pending application No. 317,547; that there is no question but that the latter application which is the one involved in the present interference is a pending application in good standing and has never become abandoned; that Field is interested in the Colman application of 1902 merely in that said application is a matter of record evidence in this office and in the question of what weight should be given said evidence in the interference.

Respondent further states that in the interference the Colman application of 1902, irrespective of whether it became abandoned in 1904, is evidence of conception of the invention disclosed therein  
68 as of the date of its filing in the Patent Office, and that if said application did not become abandoned until after the filing of the present Colman application involved in the interference, or was properly revived, Colman is entitled to the date of said application of 1902, not merely for conception of the invention, but also for constructive reduction to practice; also, that the question raised by this petition of Field involves the weight to be given said evidence in the interference proceeding, and that the proper time and place for petitioner to urge his contention is before the Court of Appeals of the District of Columbia on appeal from the decision of the Commissioner on priority when the court has before it the full interference record, rather than by his petition for certiorari before this court.

Respondent further states that the fact that the question raised by this petition originated in the interference and the fact that Colman who has a vital interest in the matter is not a party to this proceeding but is a party to the interference and can there be heard, is a further reason why the question of whether the Commissioner's action is reviewable should be considered and determined in its regular course in the interference proceeding rather than by a writ of certiorari.

Respondent further answers that there appears to be no more reason why this court should grant a writ of certiorari to consider

the matter petitioner seeks to have reviewed than that of the right of a party to make the claims constituting the issue of an interference, or the question of the patentability of the issue, when the Commissioner on a motion to dissolve the interference based upon such ground denies the motion.

Further answering the rule to show cause respondent avers that the writ of certiorari will not lie to review his action as Acting  
69 Commissioner of Patents, and avers that it has never been held by the courts that a writ of certiorari will lie to review the quasi-judicial proceedings before the head of an executive department or a bureau thereof; that to permit such review by writ of certiorari, especially in interlocutory matters, would greatly embarrass said departments and bureaus, and that the suspension of the proceedings before said departments and bureaus pending the final determination of the writ of certiorari would greatly delay the work of the executive departments of the government and would be against public policy, that in the present case the suspension of the interference proceedings pending the final determination of the writ of certiorari, ordered by this court, would result in delaying the final determination of said interference proceeding and injure the public in that the issuance of the patent to the successful party in the interference would be delayed and the time in which the public would be free to use the invention through the expiration of monopoly would be correspondingly postponed.

Respondent further avers as an additional reason why a writ of certiorari will not lie to review the action of the Commissioner of Patents that, unlike other bureaus of the executive departments, Congress has provided for a direct appeal to the Court of Appeals of the District of Columbia from such actions of the Commissioner of Patents as it intends should be reviewable by the courts.

Respondent further answering the rule to show cause avers that should it be found that a writ of certiorari will lie to review his action, Field's petition should be dismissed upon the ground that he has applied to the wrong court for the writ of certiorari;  
70 that this court and the Patent Office do not stand in the relation of superior and inferior courts necessary to warrant the issuance of the writ of certiorari; and that the determination of appeals from the decision of the Commissioner of Patents formerly vested by section 4911 of the Revised Statutes in the Supreme Court of the District of Columbia, sitting *in banc*, was vested in the Court of Appeals of the District of Columbia by section 9 of the Act of February 9, 1893, creating said court.

And now having answered the said petition and the rule to show cause filed herein, this respondent prays that the said petition be dismissed and the rule to show cause be discharged, and your respondent further prays to be hence dismissed from further answer with costs.

CORNELIUS C. BILLINGS,  
*Acting Commissioner of Patents.*

L. S. BACON,  
WEBSTER L. RUCKMAN,  
*Attorney- for Respondent.*

DISTRICT OF COLUMBIA, ss:

I, Cornelius C. Billings, being first duly sworn, on oath depose and say that I am the Acting Commissioner of Patents; that I have read the foregoing answer by me subscribed and know the contents thereof; that the matters and things therein stated of my own knowledge are true, and those stated on information and belief I believe to be true.

CORNELIUS C. BILLINGS.

Subscribed and sworn to before me this 30th day of June, 1910.

[SEAL.]

W. BERTRAND ACKER,

*Notary Public in and for D. C.*

71

*Amended Petition.*

Filed July 12, 1910.

In the Supreme Court of the District of Columbia.

At Law. No. 52700.

MILLARD F. FIELD, Petitioner,

vs.

CORNELIUS C. BILLINGS, Acting Commissioner of Patents.

W. S. Ruckman, Esq., Attorney for Respondent, U. S. Patent Office, Washinton, D. C.

SIR: Take notice that on Tuesday, the 12th day of July, 1910, at the opening of the court on that day, or as soon thereafter as counsel may be heard, I shall present to the court the annexed amended petition in the above-entitled cause and ask that the same be entered.

MELVILLE CHURCH,

*Att'y for Petitioner.*

Service acknowledged this 8 day of July, 1910.

W. S. RUCKMAN,

*Attorney for Respondent.*

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*Amended Petition.*

Filed July 12, 1910.

In the Supreme Court of the District of Columbia.

At Law. No. 52700.

MILLARD F. FIELD, Petitioner,

vs.

CORNELIUS C. BILLINGS, Acting Commissioner of Patents.

L. Seward Bacon, Esq., Attorney for Respondent and Attorney of Record in the Patent Office of Howard D. Colman, Washington, D. C.

SIR: Take notice that on Tuesday, the 12th day of July, 1910, at the opening of the court on that day, or as soon thereafter as coun-

sel may be heard, I shall present to the court the annexed amended petition in the above-entitled cause and ask that the same be entered.

(Sgd.)

MELVILLE CHURCH,  
*Attorney for Petitioner.*

Service acknowledged this 8 day of July, 1910.

L. S. BACON,  
*Attorney for Respondent and Attorney of Record  
in the Patent Office of Howard D. Colman.*

73 In the Supreme Court of the District of Columbia.

At Law. No. 52700.

MILLARD F. FIELD, Petitioner,  
vs.

CORNELIUS C. BILLINGS, Acting Commissioner of Patents.

And now comes the petitioner and amends his petition herein as follows:

At the end of paragraph 7 add—

“that the equitable title to said application and the invention covered thereby has been assigned by your petitioner to American Warp Drawing Machine Company, a corporation of the State of Maine, but the legal title to said application and invention is still vested in your petitioner and he is prosecuting the said application in the Patent Office in his own name, and he is a stockholder in said American Warp Drawing Machine Company.”

Add to paragraph 9 the following:—

“that after the said notification that judgment of priority of invention would be rendered on the record by the Examiner of Interferences against your petitioner unless cause was shown to the contrary, your petitioner, in accordance with the rules of practice in the Patent Office in such case made and provided, and particularly Rules 122 and 130, made a motion for dissolution of  
74 said interference (supported by affidavits) on the ground, among others, that the structure shown and described in said Colman’s first application of 1894, was inoperative, which motion was presented to the Examiner of Interferences, who, finding it in proper form, transmitted it to the Primary Examiner for his determination; that the Primary Examiner overruled such motion; that the effect of the making of such motion, forfeited by affidavits, as aforesaid, served to lay the foundation for the taking of testimony on the issue of the inoperativeness of the structure of said Colman 1894 application and the presentation of an argument thereon at the final hearing on priority before the Examiner of Interferences under the practice established by the decisions of the Commissioner of Patents in

Lowry et al. v. Spoon,	122 O. G. 2687
“ “ “ “ “	124 O. G. 1846
Browne v. Stroud,	122 O. G. 2688
Clement v. Browne v. Stroud,	125 O. G. 992
“ “ “ “ “	126 O. G. 2189
Pym v. Hadaway,	125 O. G. 1702”

After paragraph 22 insert as paragraphs 22<sup>a</sup> and 22<sup>b</sup>, respectively, the following:—

“22<sup>a</sup>. That the order of the respondent refusing to vacate said order of revival of said Colman’s second application was rendered on the 31st day of May, 1910; that on the 4th day of June, 1910, the Examiner of Interferences, notwithstanding the fact that your petitioner had by his aforesaid motion for dissolution brought under

75 Rules 122 and 130, laid the foundation for and had the right to take testimony on the question of the inoperativeness of the structure of Colman’s said first application of 1894 before any judgment of priority could lawfully be rendered, and without giving petitioner any time for the taking of testimony on that issue, or a day for hearing thereon, or on the main issue of priority of invention, as he should have done, proceeded to enter and did enter judgment of priority of invention in favor of Colman, fixing June 24, 1910, as the limit of appeal from such judgment; that thereupon your petitioner, on the 15th day of June, 1910, within the time limited for appeal, made a motion before the Examiner of Interferences to vacate said judgment of priority and for other relief, said motion reading as follows:

“And now comes Millard F. Field, by his attorneys, Emery & Booth, and moves:

1. That the judgment of priority rendered in favor of Howard D. Colman, under date of June 4, 1910, be vacated and set aside.

2. That, with the setting aside of said judgment of priority, times be assigned for the taking of testimony relative to the inoperativeness of the machine disclosed in the Colman application, Serial No. 526,856, filed October 24, 1894; and also relative to facts relating to the abandonment and revival of the Colman application, Serial No. 122,381, filed September 6, 1902.

3. That, with the setting aside of said judgment of priority, a final hearing be granted and an appropriate date therefor assigned.

(a) for the purpose of considering the testimony so to be taken and all others matters and questions proper to be argued at final hearing, and

(b) irrespective of the said testimony or whether the same be taken or not, for the purpose of considering the nonpatentability of certain claims to Colman and particularly the claims corresponding to Counts 13, 14 and 16, and for the purpose of considering all other matters and questions which Field is entitled to urge at final hearing before the Examiner of Interferences under Rule 130 in view of his motion for dissolution.

76 4. That the limit of appeal now set for June 24th, 1910, be stayed pending the determination of this motion and pending the determination of a petition to the Commissioner of Patents

filed in this interference on behalf of Field concurrently with this motion, and that a new limit of appeal be thereafter set.

In support of the paragraph of the motion numbered 2, reference is made to the affidavits of Charles D. Lanning and Lewis P. Sherman already of record in this interference, said affidavits having been filed in support of a motion to dissolve said interference, brought before the Primary Examiner under Rules 122 and 130. These affidavits, which are hereby made a part of the present motion, establish a *prima facie* case of inoperativeness of the machine disclosed in the said Colman application, Serial No. 526,856. These affidavits also show that the grounds which are urged against the inoperativeness of the said Colman machine do not apply to the machine disclosed in the Field application in Interference. In support of the said paragraph 2 of this motion, reference is also made to the attached affidavits of Charles D. Lanning and Millard F. Field, which show that, in the proceedings had before the Commissioner of Patents in the revival of the Colman application, Serial Number 122,381, there was a concealment and misrepresentation as to material and relevant facts pertaining to the prior abandonment of the said Colman application Serial No. 122,381, which facts should have been before the Commissioner of Patents in his consideration of the petition to revive, and in this *inter partes* proceeding should now be placed before the tribunals of the Patent Office in the form of *inter partes* testimony taken in accordance with the established rules of evidence.

EMERY & BOOTH.

*Attorneys for Field.*

Boston, Massachusetts, June 15, 1910.

which motion is still pending, undetermined, all proceedings in said interference having been suspended by order of the respondent entered June 21, 1910."

"22<sup>b</sup>. That but for the unlawful and void act of the Commissioner in reviving the abandoned application of Colman your petitioner  
77 under the interference declared between your petitioner's application and the Colman application of May, 1906, would stand as senior party and the said Colman as junior party; that in said proceeding the burden of proof would be upon the said Colman to prove all matters of fact establishing priority of discovery or invention and diligent prosecution of the same, in which proceeding petitioner would have the right to cross-examine the witnesses and offer testimony in rebuttal of said Colman's evidence. By virtue of the legal force and effect of the said unlawful order reviving said Colman's said abandoned application of 1902 and relating the same back through said abandoned application to his first abandoned application of 1894, the rights of this petitioner are denied and taken away and his position in the interference reversed, the said Colman being made the senior party and your petitioner made the junior party and the burden of proof in said interference proceeding shifted from said Colman to your petitioner; and, furthermore, by virtue of said unlawful order the said Colman is re-

lieved from offering any evidence whatsoever in support of his claim of priority or of the diligent prosecution of his discovery and invention which the law requires of him and your petitioner is debarred, though laden with the burden of proof, from offering any evidence on these subjects, in consequence whereof the right of your petitioner to a patent depending upon matter of fact to be legally ascertained through competent evidence will be finally determined without any evidence whatever; that by the rules and practice of the Patent Office your petitioner was not permitted to know and did not in fact know of the existence of the said Colman applications, or of any of them, until the declaration of interference aforesaid in October 1906, nor of the fact that two of the said Colman applications had become abandoned, nor of the *ex parte* proceedings by which the abandoned application of 1902 was revived by the unlawful order of the Commissioner herein complained of until the rule to show cause was issued on December 15, 1906, by which latter your petitioner was advised that said Colman applications were to be treated as continuing applications and that the Colman application of 1906 thereby related back to and became a continuation of the application of 1894, with the consequences to petitioner above set forth; that upon being advised of such facts your petitioner promptly challenged before the various Patent Office officials, in turn, the validity of said order of revival and sought to have the same set aside."

At the end of the petition add the following:—

"24. That a copy of the original petition and of the rule to show cause herein was served upon L. Seward Bacon, Esq., of Washington, D. C., the attorney of record in the Patent Office of the said Howard D. Colman in the said Colman application, on the 16th day of June, 1910, and that said Bacon has since appeared in Court in opposition to this petition."

MELVILLE CHURCH,  
*Attorney for Millard F. Field.*

79 CITY OF WASHINGTON,  
*District of Columbia, ss:*

I, Melville Church do solemnly swear that I have read the annexed amended petition by me subscribed and know the contents thereof; and that the statements of fact therein made as upon personal knowledge are true, and those made as upon information and belief I believe to be true.

MELVILLE CHURCH.

Subscribed and sworn to before me this 8th day of July, 1910.

THOMAS DURANT,  
*Notary Public.* [SEAL.]

Filed July 12, 1910.

In the Supreme Court of the District of Columbia.

At Law. No. 52700.

MILLARD F. FIELD, Petitioner,

v.

CORNELIUS C. BILLINGS, Acting Commissioner of Patents.

*Amendment to Answer.*

The respondent Cornelius C. Billings, Acting Commissioner of Patents, makes answer to the amendment of petitioner to his petition as follows:

Amendment to paragraph 7. Respondent denies the allegation made in the amendment to paragraph 7 of the petition, that merely the equitable title to petitioner's application No. 684,201, and the invention covered thereby has been assigned to the American Warp Drawing Machine Company, and that the legal title is still vested in petitioner. Respondent avers that according to the assignment records of this office (Libers M 57, p. 371, and Z 74, p. 191) the assignment to the American Warp Drawing Machine Company is of the "entire right, title and interest in and throughout the United States of America, its territories, and all countries foreign thereto, in and to said invention, said application for letters patent, and any and all letters patent and extensions thereof," and that the assignment authorizes and requests the Commissioner to issue the patent to the said American Warp Drawing Machine Company.

Respondent further avers that under such an assignment the patent is issued to the assignee, and that the latter takes the legal title to the patent when issued without the intervention of any court (Gaylor v. Wilder, 10 How., 477) and is regarded as giving a legal not an equitable title to the application and the invention.

As to the allegation that petitioner has prosecuted said application in his own name, respondent avers that the Patent Office records show that the power of attorney given to the attorneys of record was executed by petitioner and bears the approval of the assignee. Respondent is not informed and can neither affirm nor deny the allegation that petitioner is a stockholder in the American Warp Drawing Machine Company.

Amendment to paragraph 9. Respondent admits that petitioner brought a motion to dissolve the interference as alleged in the amendment to paragraph 9 of the petition. Respondent denies, however, that "the effect of the making of such motion, fortified by affidavits, as aforesaid, served to lay the foundation for the taking of testimony on the issue of the inoperativeness of the structure of said Colman 1894 application and the presentation of an argument at the final hearing on priority before the Examiner of Interferences under the

practice established by" certain specified decisions of the Commissioner. Respondent avers that under the practice set forth in the decisions specified, a motion must be brought before the examiner of interferences for leave to take testimony as to inoperativeness  
82 supported by affidavits making out a *prima facie* case; also, that affidavits filed in support of a motion before the primary examiner to dissolve the interference may be used in support of the motion to take testimony before the examiner of interferences.

22a. Answering paragraph 22a of the amendment, respondent admits that his decision was rendered on May 31, 1910, and that on June 4, 1910, the examiner of interferences entered judgment of priority of invention upon the record in favor of Colman. But respondent denies that the mere fact that petitioner had brought motion for dissolution of the interference laid the foundation for and gave petitioner the right to take testimony on the question of inoperativeness of the structure of Colman's 1894 application before any judgment of priority could be rendered, or that the practice in the present case of entering record judgment without setting the case down for final hearing differed in any way from the usual practice in the Patent Office.

Respondent further avers that on December 15, 1906, and again on August 27, 1907, petitioner was notified that judgment on the record would be rendered against him unless he showed good and sufficient reason why such action should not be taken, in that petitioner had ample time for bringing such motions and making such showing as he desired. Respondent admits the filing of the motion of June 15, 1910, by petitioner, that the motion is still pending, and that proceedings in said interference have been suspended in accordance with the order of this court.

22b. Respondent denies that the act of the Commissioner in reviving Colman's application was unlawful and void, as alleged in several places in paragraph 22b. Respondent further denies that  
83 by said order petitioner's rights are denied and Colman is relieved from offering any evidence in support of his claim of priority, since he has record evidence due to the filing of his applications in this office on the dates specified.

24. Respondent admits the allegations of paragraph 24.

As an additional reason why a writ of certiorari should not issue to review the action of the Commissioner of Patents, respondent states that the original action reviving the Colman application was made by former Commissioner Frederick I. Allen, and that the matter was presented upon the same state of facts by the petition of Field requesting respondent to reverse the order reviving the application; that under the circumstances of this case, as stated by the respondent in his decision (petitioner's Exhibit D), according to Rule 144 of the Rules of Practice of this office, which provides that "Cases which have been deliberately decided by one Commissioner will not be reconsidered by his successor except in accordance with the principles which govern the granting of new trials," and in accordance with the holding of this court *in re* Hoeveler and McTighe, 21 D. C. Reports, 107, he was without power to set aside or reverse the

decision of the former Commissioner even if he had reached a different conclusion on the merits of the question; also, that since respondent had no authority to set aside the order of his predecessor, it is not thought that a writ of certiorari will lie to review his action.

CORNELIUS C. BILLINGS,  
*Acting Commissioner of Patents.*

W. S. RUCKMAN,  
*Attorney for Respondent.*

84 DISTRICT OF COLUMBIA, ss:

I, Cornelius C. Billings, being first duly sworn, on oath depose and say that I am the Acting Commissioner of Patents; that I have read the foregoing answer by me subscribed and know the contents thereof; that the matters and things therein stated of my own knowledge are true, and those stated on information and belief I believe to be true.

CORNELIUS C. BILLINGS.

Subscribed and sworn to before me this 12th day of July, 1910.

[SEAL.]

EDWD. B. FOX,  
*Notary Public in and for the D. C.*

85

Filed July 14, 1910.

In the Supreme Court of the District of Columbia.

At Law. No. 52,700.

MILLARD F. FIELD, Petitioner,

vs.

CORNELIUS C. BILLINGS, Acting Commissioner of Patents.

*Stipulation.*

It is hereby stipulated and agreed between the parties to this proceeding (Howard D. Colman, applicant in the interference proceeding mentioned joining herein by his counsel and attorney in fact)

I. That the actual issuance and service of the writ of certiorari directed by the Court to issue and the formal return thereto be waived.

II. That the record in the office of the Commissioner of Patents in addition to the matters appearing in the pleadings herein discloses the following:

That in the return to the rule to show cause why judgment should not be entered against him the party Field urged and contended that the order should not be entered because

(a) "as appears by the record and filing date of the application of Field in interference Serial No. 684,201, filed June 23, 1898, is

anterior to the date of the Colman application in interference Serial No. 317,547, filed May 18, 1906, and to the date of the Colman application, Serial No. 122,381, filed Sept. 6, 1902."

(b) That the Colman application in interference and the Colman application of Sept. 6, 1902, were not proper continuations of the earlier Colman application of 1894.

86 (c) That the invention shown in the first Colman application was inoperative and therefore was not effective as a bar against the application of Mr. Field.

(d) That Colman has no right to make the claims corresponding to the counts of the interference as originally declared, especially counts 1 to 8, inclusive, 10 to 28, inclusive, and 30, 31 and 33 which are unpatentable to Colman in that they are barred under Section 4887 of the Revised Statutes by his own British and French patents for the same invention granted on applications filed more than twelve months prior to the filing date (May 18, 1906) of his application in interference.

III. That the petitioner Millard F. Field did file in the United States Patent Office on or about the 17th day of June, 1910, a motion directed to the Commissioner of Patents seeking and praying that the Commissioner of Patents reopen the interference and permit the party Field to take testimony concerning the facts "relating to the abandonment and revival of the said Colman application Serial No. 122,381, and that the Commissioner set times for taking testimony in that particular," which motion is still undetermined.

IV. That the file wrappers of the various applications referred to in the petition contain the following entries, to wit:—

87

Div. 21.

Number (Series of 1900)

317,547.

1906.

Div. 21.

Ex'r's Book 49-412.

Patent No. —.

Name, Howard D. Colman, ass'or to Barber-Colman Company of Rockford, Ill., a corp. of Ill.,

Of Rockford,

State of Illinois.

Invention: Machine for Drawing in Warp Threads.

Petition, May 18, 1906.

Affidavit, " " 1906.

Specification, " " 1906.

Drawing, 18 sheets, " " 1906.

First Fee cash \$15, May 18, 1906.

Appl. filed complete May 18, 1906.

Associate Attorney-, Bacon & Milans, Attorney, L. L. Miller,

McGill Bldg.,

Monadnock Block,

Washington, D. C.

Chicago, Ill.

139. 139. Weaving,

Warp Replenishing,

Drawing.

139. Weaving,

Warp Replenishing,

Drawing.

139. Weaving,

Warp Replenishing,

Drawing.

1906.

*Contents.*

Print —, Oct. 2, 1906.

Application, 1 papers.

1. Rejection, Sept. 12, 1906.

2. Amendment A, Sept. 26, 1906.

3. Intf. letter, Oct. 4, 1906.

4. Asso. power of attorney, Oct. 30, 1906.

4½. Amendment B, Jan. 10, 1907.

5. Letter, June 11, 1908.

6. Amendment C, June 19, 1908.

7. Amendment D, June 27, 1908.

8. Letter, June 30, 1908.

9. Letter, Aug. 12, 1909.

10. Letter, Sept. 2, 1909.

11. Int. letter A, Oct. 13, 1909.

12. Int. letter B, Oct. 7, 1909.

Abandoned by Applicant.

Revived.

Number, Series of 1900,

122,381.

1902.

Div. 21.

Ex'r's Book 8-770.

Patent No. —.

Name, Howard D. Colman, ass'or to Barber-Colman Company, of  
Rockford, Ill., a corporation of Illinois,

Abandoned.

Of Rockford,

State of Illinois.

Invention: Machines for Drawing in Warp Threads.

Petition, Sept. 6, 1902.

Affidavit, " " 1902.

Specification, " " 1902.

Drawing, 18 sh'ts, " " 1902.

First Fee Cash \$15, Sept. 6, 1902.

Application filed complete Sept. 6, 1902.

Attorney, L. L. Miller,

1237 Monadnock Block,

Chicago, Ill.

Name, Howard D. Colman. Serial No. 122,381.

90

1902.

*Contents.*

- Application, — papers. O. K.
1. Rejected Dec. 6, 1902.
  2. Petition to revive, Jan. 11, 1904.
  3. Ex'r's statement, Jan. 12, 1904.
  4. A, Jan. 11, 1904.
  5. Notice of Dec., Jan. 19, 1904.
  6. Rejection, Nov. 14, 1904.
  7. Amendment B, July 20, 1905.
  8. Letter, July 22, 1905.
  - 8½. Letter to office, Oct. 20, 1905.
  9. Amendment C, Oct. 25, 1905.
  10. Letter, Mar. 14, 1906.
  11. Amendment D, Apr. 5, 1906.
  12. Letter, Apr. 18, 1906.
  13. Amendment E, May 17, 1906.
  14. Letter to office, May 21, 1906.
  15. Letter, May 21, 1906.
  16. Letter to office, May 28, 1906.
  - Abandonment.
  17. Letter, May 31, 1906.

91

Division 20.

Serial No. 526,856.

1894.

Abandoned.

Patent No. —.

6

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671

Howard D. Colman.

Abandoned.

Of Beloit,

State of Wisconsin.

Invention: Machine for Drawing in Warp Threads.

Petition, Oct. 22, 1894.

Affidavit, " " "

Specification, " " "

Drawing, 18 sh'ts, " " "

Prints, 8 sh'ts, Mar. 25, 1895.

First fee, cash, \$15, Oct. 24, 1894.

Application filed complete Oct. 24, 1894.

Asso:

Luther L. Miller,

1736 Monadnock Block,

Chicago, Ills.

92

1894.

Contents.

- Application, — papers. O. K.
1. Amend't A, Oct. 22, 1894.
2. Rejection, Dec. 29, 1894.
3. Amend't B, Mar. 25, 1895.
4. Affidavit & prints, Mar. 25, 1895.
5. Rejection, Apr. 17, 1895.
6. Amend't C, Oct. 14, 1895.
7. Rejection, Nov. 23, 1895.
8. Amend't D, May 16, 1896.
9. Rejection, June 27, 1896.
10. Final rejection, Feb. 1, 1897.
11. Amend't E, June 28, 1897.
12. Letter, July 7, 1897.
13. Letter to office, July 14, 1897.
14. Rejection, Aug. 11, 1897.
15. Asso. power of attorney, Aug. 2, 1899.
- 15½. Amendment F, Aug. 2, 1899.
16. Letter to office, Aug. 14, 1899.
17. Letter, Sep. 7, 1899.
18. Letter to office, Jan. 23, 1902.
19. Letter of abandonment, Oct. 6, 1902.
20. Letter, Oct. 7, 1902.

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Div. 21.

(Serial Number)

684,201.

1898.

(Ex'r's Book)

234

Patent No. —.

437

Millard F. Field [ass'or to John Clarke, trustee, of same place],\*  
ass'or by mesne assig'ts to American Warp Drawing Machine Com-  
pany of Boston, Mass., a corp[oration]\* of Massachusetts,  
Of Boston,  
County of ———,  
State of Massachusetts.

Invention: Warp Drawing Machines.

Parts of application

filed.

{

Petition .....June 23, 1898.

Affidavit ..... “ “ “

Specification ..... “ “ “

Drawing, 2 sh'ts..... “ “ “

Prints, 2 sh'ts.....Apr. 17, 1899.

Model.....

Specimen.....

First fee Cash \$15....June 23, '98.

“ “ Cert.....

Appli. filed complete..June 23, '98.

Examined ——— —.  
Countersigned. ——— ———,  
For Commissioner.

[\* Words and figures enclosed in brackets erased in copy.]

Notice of allowance ———, 189—.

Final fee Cash ———, 189—.

3 “ “ Cert. ———, 189—.

Patented ———, 189—.

Asso., Emery & Booth, Boston, Mass.,  
[Crosby & Goddard,]\*  
23 Court Street,  
Boston, Mass.

Geo. L. Roberts & Bro.,  
95 Milk St.

94 139. Weaving, Tying in Warps.

1898.

*Contents.*

- Application, 1 paper. O. K.
1. Rejection, Nov. 4, 1898.
  2. Amendment A, Nov. 4, 1899.
  3. Amendment B, Nov. 6, 1899.
  4. Rejection, May 23, 1900.
  5. Rev. & power of att'y, Aug. 1, 1900.
  6. Amendment C, Apr. 9, 1901.
  7. Rejection, May 2, 1901.
  8. Amendment D, Apr. 29, 1902.
  9. Rejection, July 21, 1902.
  10. Amendment E, July 17, 1903.
  11. Letter, Oct. 2, 1903.
  12. Amendment F, Sept. 17, 1904.
  13. Letter, Jan. 14, 1905.
  14. Amendment G, Jan. 17, 1905.
  15. Letter, Jan. 24, 1905.
  16. Amendment H, Jan. 23, 1905.
  17. Amendment I, Feb. 18, 1905.
  18. Letter to office, March 17, 1905.
  19. Letter, Apr. 21, 1905.
  20. Amendment J, July 3, 1905.
  21. Rejection, Nov. 18, 1905.
  22. Letter to office, Jan. 17, 1906.
  23. Assoc. P. of A., March 8, 1906.
  24. Letter, March 14, 1906.
  25. Letter to office, March 8, 1906.
  - 25½. Letter to office, Apr. 9, 1906.
  26. Amendment K, April 11, 1906.
  27. Letter, April 18, 1906.
  28. Amendment L, April 21, 1906.
  29. Amendment M, July 21, 1906.
  30. Letter, Sept. 12, 1906.

31. Amendment N, September 15, 1906.
32. Int. letter.
33. Dodge & Sons as of counsel, Dec. 18, 1906.
34. Statement of Dodge & Sons.
35. Authority to appear as counsel.
- 35½. Amendment O, Aug. 6, 1907.
36. Withdrawal of P. of A., Dec. 9, 1907.
37. Letter to office, Dec. 31, 1907.
38. Letter, Jan. 22, 1908.
39. Letter, June 12, 1908.
40. Letter, Aug. 14, 1909.
41. Amendment P, Sept. 9, 1909.
42. Rev. power and assoc. power of att'y, Feb. 17/10.
43. Notice of rev. & accept., Feb. 21, 1910.

95        V. That the record and proceedings in this cause, consisting of the Petition and Amended Petition and exhibits thereto, and the Answer and Amended Answer, together with the matters set out in the second paragraph hereof, in fact constitute and contain all of the record and proceedings and all things pertaining thereto in the office of the Commissioner of Patents, material, necessary and proper to be shown and considered herein and all which would properly be required in obedience to said writ of certiorari and may be taken, treated and accepted in lieu of a formal compliance with said writ of certiorari in all respects as though the same had been returned to the Court in this cause in obedience to and compliance with said writ of certiorari.

W. S. RUCKMAN,  
*Counsel for Com. of Patents.*

L. S. BACON,  
*For Respondent & Counsel for H. D. Colman.*  
MELVILLE CHURCH,  
W. G. JOHNSON,  
*Counsel for Petitioner.*

July 14/10.

96

*Opinion.*

Filed July 15, 1910.

In the Supreme Court of the District of Columbia.

No. 52700. At Law.

MILLARD F. FIELD, Petitioner,

vs.

CORNELIUS C. BILLINGS, Acting Commissioner of Patents,  
Respondent.

The COURT: Perhaps I had better dispose of this case now, while we are all together, as I shall not have time to give it much further consideration, even though I should reserve my decision.

I find no difficulty in going along with the argument of the petitioner, so far as the power of the court to issue this writ is concerned. If the Patent Office proceeds without authority of law, its action may be reached by the writ of mandamus or by the writ of certiorari from this court.

The great question in the case is whether the Commissioner *was* proceeding without authority of law when he revived this application. He had no legal authority to revive it until it was shown to his satisfaction that the delay was unavoidable. What evidence, tending to show that the delay was unavoidable, should satisfy the Commissioner, was for him to say. That is admitted. But, of course, there must have been some evidence tending to show that it was unavoidable within the legal meaning of that word, before he could revive.

97 Now, this petition for revival is not put on the ground of unavoidable delay, as has been pointed out over and over again here. It is put on entirely different grounds. There is nothing except the bare decision of the Commissioner itself ordering the revivor from which it can be argued that he thought the delay was unavoidable. He does not state so. The petitioner, by his attorney, admits that the delay was avoidable, and might have been avoided by the use of very ordinary diligence.

I doubt whether it can be held that that expression "unavoidable delay" is so strong as argued by the petitioner, that not even the slightest failure to observe perfect diligence, perfect care and unremitting attention, would be consistent with unavoidable delay. But I cannot help being struck here by the fact that the Commissioner did not revive this application upon the ground that there was unavoidable delay, but upon other grounds. It would be so difficult to reach the conclusion that the delay was unavoidable, upon the affidavit of Mr. Miller, that I cannot conceive that the Commissioner did find it to be unavoidable within any such meaning of the words as I understand them to have in law.

Suppose you say that they mean "unavoidable by the use of reasonable diligence": Can it be conceived that the Commissioner said to himself "This delay in this case could not have been avoided by the use of any reasonable diligence; it was not a shortage in the use of reasonable diligence that caused this?"

I cannot conceive, upon reading that affidavit, that his decision could have been put on that ground, and the only way that I can understand or explain it is that it was put on the ground

98 mentioned in the report of the examiner, that is, of the hardship of requiring a new application to be made, and the inconvenience to the office. That was the ground upon which the recommendation was made by the examiner, and I can not conceive of any other ground upon which the decision could have been based. In other words, it was treated as a matter of discretion.

It seems to me perfectly plain that the statute was wrenched from its true meaning when that question was decided, and I think I should hold with the petitioner upon this question and order the writ to issue.

The case has been heard practically upon the application for the writ, upon the record, and perhaps it will be best to make the necessary order so that the case may go up on appeal now.

Mr. CHURCH: On the present record. I think everything is here.

The COURT: Well, you can agree upon the form of the order.

Mr. BACON: If your Honor please, with regard to the question of the record to go up, there may be other papers in addition. You have asked for several papers today, that are not in the record.

Mr. JOHNSON: I think we can agree upon that.

The COURT: I have no doubt you can agree; and should there be any questions between you, I will settle those.

Thereupon, at 4:20 o'clock p. m., the Court adjourned until Wednesday, July 13, 1910, at 10 o'clock a. m., when the form of the judgment to be entered was submitted to the court.

99 Mr. JOHNSON: I do not know that your Honor cares to hear anything further from me on the subject of the form of the judgment.

The COURT: No. Mr. Bacon, before you take your seat—the situation is presented to my mind in this way: In this petition for the writ it was necessary not only to show the error, but to show it was prejudicial to the petitioner. The petitioner attempts to set forth the matter in which he is prejudiced, and that is by this order of June 4, 1910, and the order relating to seniority of the parties. He alleges that, and necessarily alleges it, in order to show that he is hurt. That makes that proper matter to be answered, and as I understand the statement of the pleadings, it is admitted that he is thus hurt. So that that matter was at issue and has been determined.

Now, if the respondent could have said that, notwithstanding the proceeding back in 1904, still the petitioner was not hurt, because notwithstanding that, he was to have his seniority—if anything of that sort could have been said, or if it could have been said in any way that he was not injured, that certainly was matter to be set up in the answer.

The suggestion from you seems to be that there may be some other reasons, some other grounds on which the respondent may deny him seniority.

If there was some other legal ground on which he could have been denied seniority then he was not hurt in the manner he  
100 claims he was, and he was not hurt by this order. If he is entitled to seniority, notwithstanding that, it was for the respondent to have shown that before; that would be an answer to the petition. So it seems to me that what you suggest is precluded by the pleadings; it would not be competent for you now to say that.

While I should very much dislike to go further than necessary, I feel that I ought to go far enough to settle this matter, as far as it is necessarily involved in the pleadings, so that the parties may not be required to come here again with any of the matters which are necessarily involved in this proceeding. Unless you can show me that these matters you mention are not involved in it, I feel bound to make the order broad enough to cover them.

(Endorsed.)

Let this be filed.

WENDELL P. STAFFORD,  
*Justice.*

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*Judgment, Appeal, &c.*

Filed July 15, 1910.

In the Supreme Court of the District of Columbia.

No. 52700. At Law.

MILLARD F. FIELD, Petitioner,

vs.

CORNELIUS C. BILLINGS, Acting Commissioner of Patents,  
Respondent.

Now come again here the above named parties, to wit, Millard F. Field, the petitioner and Cornelius C. Billings, Acting Commissioner of Patents, by their respective counsel and the matter of the said petition being heard by the Court upon the original and amended petitions and the exhibits thereto, and the answers of the respondent to the said original and amended petitions and upon the rule to show cause entered herein on the 16th day of June, A. D. 1910, and the matter of said petition having been argued by Counsel for the petitioner and by respondent and by L. Seward Bacon, Esq., Counsel and attorney in fact for said Howard D. Colman in the Patent Office in the matter of his applications for letters patent and the interference proceedings therein, in the petition in this cause mentioned, and having been considered by the Court, it was by the Court considered and adjudged that the writ of certiorari should be issued to the respondent herein, as prayed in the petition, commanding him to transmit to the Court the record of the said proceedings and all things pertaining thereto to the end that the errors therein complained of should be corrected according to law.

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And it appearing to the Court that thereupon by written stipulation filed in these proceedings signed by the Counsel of record for the petitioner and for the respondent and for the said Howard D. Colman, it is agreed between all said parties that the formal issuance of and return to said writ of certiorari be waived and that the record herein, including the matters in said stipulation, contains all the said record and matters and things pertaining thereto in the office of the Commissioner of Patents, material, necessary and proper to be considered by this Court in this proceeding and that the Court may act thereon as though the same had been duly transmitted as the entire record and all things pertaining thereto, in obedience to the said writ of certiorari; and upon inspection of the said record it appearing to the Court upon the face thereof that manifest error hath been committed to the prejudice

of the legal rights of the petitioner and contrary to law, it is therefore by the Court considered and adjudged as follows:

1. That the order, decision and judgment entered in the said interference proceedings on the 4th day of June 1910, adjudging priority to the said Howard D. Colman be and the same is quashed and for naught held.

2. That the order, decision and judgment entered in the said proceedings on the 19th day of Jan. 1904, reviving the abandoned application of said Howard D. Colman filed on the 6th day of September 1902, being Serial No. 122,381, be quashed and for naught held and that the said abandoned application do stand as abandoned as of the 6th day of December 1903, by operation of law under the terms of Section 4894 of the Revised Statutes of the United States.

103 3. That the order, decision and judgment entered in the said interference proceedings in the said record in the proceedings herein shown whereby the said Colman was made senior and the said Fields was made junior be quashed and for naught held and that the respondent is directed to cause the said interference proceedings to be proceeded with according to law making the said Millard F. Field under his application filed on the 23d day of June, 1898, being Serial No. 684,201 senior in said interference and the said Howard D. Colman under his application No. 317,547, filed on the 18th day of May 1906, junior in said interference proceedings.

And it is further considered and adjudged that the petitioner do recover of the respondent his costs in this proceeding to be taxed by the clerk of this Court.

From this judgment the respondent appeals in open court to the Court of Appeals, said appeal to operate as a supersedeas without bond.

WENDELL P. STAFFORD, *Justice*.

104 *Directions to Clerk for Preparation of Transcript of Record.*

Filed July 15, 1910.

In the Supreme Court of the District of Columbia.

No. 52700. At Law.

MILLARD F. FIELD, Petitioner,

vs.

CORNELIUS C. BILLINGS, Acting Commissioner of Patents,  
Respondent.

Clerk of the Supreme Court of the District of Columbia:

\* \* \* \* \*

In the matter of the suit entitled Millard F. Field, Petitioner, vs. Cornelius C. Billings, Acting Commissioner of Patents, at law No.

52,700, please furnish me certified transcript of the proceedings in said cause for use in connection with the appeal to the Court of Appeals of the District of Columbia. The papers required are as follows:

1. The petition and the exhibits referred to therein, to wit, Exhibits A, B, C and D.
2. The Court's order to show cause dated the 16th day of June 1910.
3. The respondent's answer to the order dated June 30, 1910.
4. The amended petition dated July 18, 1910.
5. The amended answer dated July 11, 1910.
6. The stipulation between the parties filed July 14, 1910.
- 105 7. The Court's decision filed July 14, 1910.
8. The Court's decision dated July 14, 1910.

L. S. BACON,

*Att'y for the Comm. of Patents and H. D. Colman.*

106 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,  
*District of Columbia, ss:*

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 105, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 52700 at Law, wherein Millard F. Field is Petitioner and Cornelius C. Billings, Acting Commissioner of Patents, is Respondent, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 17th day of August, 1910.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk.*

By FRED. C. O'CONNELL,  
*Ass't Clerk.*

Endorsed on cover: District of Columbia, Supreme Court. No. 2210. Cornelius C. Billings, &c., appellant, vs. Millard F. Field. Court of Appeals, District of Columbia. Filed Aug. 23, 1910. Henry W. Hodges, Clerk.